IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

)MMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 30 OF 2022

ANWAR MOHAMED..... 1ST PLAINTIFF

ROSACHIM SARL..... 2ND PLAINTIFF

VERSUS

UNICORD (T) LIMITED.....DEFENDANT

JUDGMENT

Date of last order: 07/12/2022
Date of judgment: 24/02/2023

AGATHO, J.:

The Plaintiffs filed a suit praying for judgment and decree against the Defendant for the following reliefs: a declaration that the Defendant has breached the terms of the purchase order contract, specific performance of the contract in alternative payment of USD 88,920 being the actual amount received by the Defendant in consideration of two sisal fibre containers, an order for payment of USD 50,000 being expected profit had the Defendant supplied the containers timely, general damages to be assessed by the Court, interest at Court rate from the date of judgment to payment in full, costs of the suit and any other relief the Court deems just and equitable to grant.

Upon being served with plaint, the Defendant file her Written Statement of Defence disputing plaintiff claim on ground that there was no valid contract between that

parties. On that note, the defendant invited the plaintiff into strict proof of her claims thereof and eventually prayed that the suit be dismissed with costs.

Both parties to this case engaged services of learned counsel. Whereas the Plaintiffs were represented by advocate Abubakar Salim, the Defendants were under legal representation of advocate Wilson Edward Ogunde. Before hearing the following issues were framed, recorded by the court and agreed between the parties for determination of this suit as follows:

(1) Whether there was an oral agreement between the Plaintiffs and the Defendant for the supply of two sisal fibre containers.

(2) Whether the Defendant breached the said agreement

(3) To what reliefs are the parties entitled to.

Plaintiff in proof of his case called two witness, Anwar Mchamed and Tesiel Augustino Kikoto whom they testify that, plaintiffs and defendant entered into oral agreement through Khorshid Mulla in 2019 for supply of two sisal containers to be shipped to Casablanca Morocco. It was a plaintiff case that at first place the container was delivery to Morocco and defendant effected payment. It was stated Khorshed Mulla approached the plaintiff and by oral agreement two more sisal container were supplied but defendant failed to perform its obligation as agreed, the plaintiff thoroughly made a friendly follow up of aforesaid dues to settle the amount but in vain. In proof of her claim plaintiff tendered a Notice of debt acknowledgement and payment plan agreement and WhatsApp extracted texts as **exhibit P1 and P2**respectively. On the other hand, the defendant was defended by one witness, Omary Mulla who denied to have entered into oral agreement for plaintiff for supply of

sisal as a such they have never received a sum of USD 88,920.00 and purported agreement dated 15.10.2021 was not sanctioned by special resolution of the defendant company.

At the end of hearing of the witnesses, the learned counsel prayed under Rule 66(1) of High Court Commercial Division Procedure Rules of 2012 as amended in 2019 to file their closing submissions, the same was granted. I will along with testimonies of their witnesses, take into account such closing submissions of the counsel for the parties as I address issues raised in this case.

The first issue was couched thus, whether there was an oral agreement between the Plaintiffs and the Defendant for the supply of two sisal fibre containers. The learned counsel for plaintiff submitted that the Plaintiffs entered into oral agreement as per exhibit P1 and P2. On the other hand, the learned counsel for Defendant has strongly submitted that there was no oral agreement between Plaintiffs and the Defendant on three-fold, **one** WhatsApp messages between plaintiff Khorshid Mulla and plaintiff does not constitute agreement. **Two,** it was not sanctioned by special resolution of the company. And **three,** that Khorshed Mulla had no mandate to transact any business on behalf of defendant company as he was neither shareholder nor director and was not empowered by any instrument to act on behalf of the company. It is trite law in our jurisdiction that a contract may be oral or written. The Plaintiffs have termed oral agreement the exchange of short text messages on WhatsApp and physical meetings the parties had. The next question I asked myselfis can a contract be concluded electronically that is via WhatsApp messages? It is uncontroversial that in Tanzania contracts may concluded via electronic means. Sections 21(1) and (2) of Electronic Transactions Act, 2015 herein referred as ETA provides that a contract may

be formed electronically and that a contract shall not be denied its validity or enforceability because it was formed electronically.

If that is the position of the law and so long it is undisputed that the exchanges of promises to deliver the sisal fibre containers were communicated via WhatsApp messages, it is my considered view that the WhatsApp messages are confirmation of existence of a valid contract as per the ETA. And that contract cannot be denied its validity simply because it was concluded electronically. See also the USA case of **Moore v Microsoft 293 A. D,2d 587(N. Y App. Div 2002.)**. In addition, the parties conduct and testimony of PW2 substantiate that there was an oral agreement. Moreso, the 1st Plaintiff has tendered the WhatsApp messages as exhibit P2 and Exhibit P1, a debt acknowledgement (promise to deliver the two containers on15/12/2021 and 15/01/2022) and payment plan signed on 15/10/2021 by Abdulrahim Mulla (one of the directors of the Defendant) to prove that there was a contractual relationship between the parties. In the case of **Hotel Travertine Limited and Two others V. National Bank of commerce Limited [2006] No 133 TLR** the court of appeal quoted the following passage in the case **Brodgen V Metropolitan Railway .co (1989) 2App Case 666 (HL)**that:

> " *I have believed always the law to be this, that when an offer is made to another party, and in that offer, there is a request express or implied that he must signify his acceptance by doing some particular thing, then, as soon as he does the thing is bound.*"

I find this statement relevant in this case, on the following reasons, exhibit P2 shows how the parties communicated through WhatsApp messages. Worse enough the Defendant does not dispute both in pleadings and evidence that there was communication through WhatsApp messages. Surprisingly, PW1 was not cross examined by the learned advocate for the Defendant on the point and as a matter of principle, a party who fails to cross examine a witness on certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said. Then, if that is the position, failure of learned counsel for plaintiff to cross examine PW1 on that fact, should be taken to be an admission or acceptance that there was contractual relationship between the parties. This legal position was stated by the Court of Appeal in the case of **SHADRACK BALINAGO v FIKIRI MOHAMED @ HAMZA & 2 OTHERS, CIVIL APPEAL NO. 223 OF 2017 (CAT) MWANZA (UNREPORTED)** in which it was held that: -

> *"As rightly observed by the learned trial judge in her judgement, the appellant did not cross examine the 1st respondent on the above piece of evidence. We would, therefore, agree with the learned judges' inferences that the appellant's failure to cross examine the 1st respondent amounted to acceptance of the truthfulness of the appellant's account."*

It is on that account that, I agree with the plaintiff that, there was oral agreement between the parties.

Turning to the second fold, the learned counsel for Defendant has submitted that the purported agreement was not sanctioned by the board resolution. On the other hand the learned counsel for Plaintiffs has submitted the excuse that there was no power of attorney or board resolution is an afterthought in the ambit to disown exhibit P1.The issue for determination at this juncture is whether a decision or all activities and contract entered by a company requires board resolution and or power of attorney? From the outset, a general rule is that a company operates or function through the Board of Directors which directs the mind of the company. See the cases of **Salomon v Salomon & Co. Ltd. (1897) A.C.22**,and **Mike W. Kitwaka *(as Lawful Attorney of Floyd Vernon Hammer)* v Parseko Vincent Kone and Two others, Civil Case No. 6 of 2019, HCT, Tanga District Registry, (unreported),** as well as Section 39 of the Companies Act [Cap 212 R.E. 2002]. However, there are exceptions to the rule that operation of the company is through board resolutions. Iam saying so because there are instances where the directors may conclude contracts on behalf of or for the benefit of the company. It is equally true that the issue of board resolution is internal affairs of the company an outsider may not know if the resolution has been procured as held in the case of **BETAM Communications Tanzania Limited v China International Telecommunication Limited and Others, Civil Case No. 220 of 2012 HCT at Dar salaam** (unreported).That is what happened in the present case. Despite DW1's denial that the company did not conclude the contract with the Plaintiffs and his brother (Abdulrahim Mulla) entered into the contract in his personal capacity.

Surprisingly, the DW1 did not tell the Court whether there was any conflict among the directors of the Defendant. Nor did he deny that the Defendant did not receive the

payment for the containers of sisal fibre. Therefore, in absence of proof that the directors acted *ultra vires* and contrary to Defendant company's interest the contract concluded remains valid and enforceable against the Defendant.

In the circumstance of this case, the power of attorney and board resolution are internal affairs of the company that rarely bind third parties. They cannot be used to insulate the Defendant company or deny the contract concluded by the directors for benefit or on behalf of the company. Truly, each case has to be decided based on its own set of facts. It is also intriguing that the DW1 while decried the absence of board resolution and power of attorney. By the same token he did not tell the Court why the WSD filed was not sanctioned by the board resolution or power of attorney. More alarming is the fact that the Defendant failed to bring a key witness one Abdulrahim Mulla (the director of the Defendant company) on a lame excuse that he was upcountry for business. Since defendant has failed to call one Mr. Abdulrahim Mulla who was a key witness who signed debt acknowledgement (Exhibit P1) this court draws an adverse inference on the side that ought to bring the said witness that whatever the witness would have testified could have damaged a calling party's case. This instance was taken in the case of **Montix Knight Wear limited vs. Goppitex, Civil Case No 834 /2004 [2009] EKLR.** See also **Wambura Marwa Wambura v R., Criminal Appeal No. 115 of 2019 CAT at Mwanza.**

Coming to the third fold, in which the learned counsel for defendant submitted that, Khorshed Mulla had no mandate to transact any business on behalf of defendant company as he was neither shareholder nor director and he was not empowered by an instrument to act on behalf of the company. I must state from the outset that one may be tempted to conclude that there was no valid agreement because according to

DW1, Khorshid A. Mulla (deceased) who negotiated and concluded the contract with the Plaintiffs was neither a shareholder nor director of the Defendant company. Moreover, the Defendant's counsel submitted that the Plaintiffs made payment to Nyanza General Supply (Defendant's sister company) and not to the Defendant. Further, in the exchange of WhatsApp message neither Khorshid A. Mulla nor Abdulrahim A. Mulla mentioned UNICORD (the Defendant) in the messages (exhibit P2a).

The issue to be resolved is whether Khorshid A. Mulla was the director of the Defendant company. If he was neither the director nor the shareholder, why then his brother Abdulrahim A. Mulla (one of the directors of the Defendant) signed the debt acknowledgement and payment plan (exhibit P1). He categorically stated in that document that the Defendant Company takes full responsibility for repayment. The Defendant's counsel claimed that the said document lacked company seal as required by Section 39(1) and (2) of the Companies Act. But looking at exhibit P1 (debt acknowledgement) the Defendant company's stamp is visible. Another critic the Defendant's counsel voiced is the failure to mention the Defendant company's name in the WhatsApp messages (exhibit P2) exchanged by 1st Plaintiff and Khorshid A. Mulla and Abdulrahim A. Mulla. In my view, that does not invalidate the contract. What matters is the content of the messages. Omission to mention UNICORD in the texts is not fatal as the subject matter of the sale agreement was sisal fibre which is known to the parties.

The Defendant yet attacked the claim by asking to whom did the Plaintiffs effect payment? Was the payment for the delivery of two sisal fibre containers done to UNICORD or Nyanza General Supply? According to submission of the Defendant's

counsel and allegedly exhibit P1 paragraph 2 stating that payment will be through sister company called Nyanza General Supply. The allegation that the payment for the sisal containers were made to Nyanza General Supply (Defendant's sister company) account is worthy to be examined. Mr. Ogunde, the Defendant' learned counsel submitted that PW1 during cross examination testified that the payment for sisal container was made to the Defendant's sister company, Nyanza General Supply. My scrutiny of the Court record of proceedings especially testimony of PW1 (Anwar Mohamed) does attest that the Defendant acknowledged receiving payment of USD 44,000/= from him (PW1). And PW1 added in his testimony during cross examination that the Defendant transacted through Nyanza General Supply though he admitted having not brought any evidence to show that they are sister companies. From PW1' testimony it is unclear whether it was Nyanza General Supply that exported the sisal container to Casablanca, Morocco. Again, if Nyanza General Supply did transport the sisal container, I am of the considered view that it is not illegal for a third party to transport goods of contracting parties. It equally not forbidden for a company to use another company (sister company) to receive payment. But since the witnesses did testify that, the Defendant company officials acknowledged receiving the payment the issue that the money was not received in the Defendant's account withers. I thus find the Defendant's counsel submission to be without merit. After all the Defendant's witness (DW1) said nothing on the issue of Nyanza General Supply being a stranger. Consequently, the Defendant cannot deny the existence of the agreement and ensued liability. In my settled view, there was a valid oral agreement between the parties.

Having decide that there was oral agreement between the parties the question that follows is whether the Defendant breached the said agreement?PW1 testified that

there was an agreement between the parties, and that the Defendant beached it by failing to deliver the sisal fibre containers as agreed. The DW1 on his side contended that the contract was concluded by Abdulrahim Mulla in his personal capacity. From this it is follows that in his view the Defendant did not breach any contract. However, having found in the first issue that there was a valid contract between the parties, and since exhibits P1 and P2(a) are crystal a conclusion that can be drawn is that the Defendant's failure to deliver the sisal fibre containers amount to a breach of contract.

It is settled legal position that breach of contract occurs when one party in a binding agreement fails to perform its obligations and conditions according to the terms and conditions of the contract. The provision of section 37 the Law of Contract Act [Cap 345 R.E. 2019] underscores the point. For easy reference I produce it hereunder:

> *Section 37(1) "the parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this Act or of any other laws."*

Guided by the above legal stance, the next question I asked myself is, was there any such failure on the part of the Defendant? Having gone through the pleadings, the respective testimonies of the parties and final closing submissions and traversed the exhibits tendered, I am satisfied that in the circumstances of this suit, Defendant breached the contract because the said containers were not delivered despite promises made as seen in exhibit P2. Moreover, exhibit P1 is loud that the debt was acknowledged, and payment plan was set. Thus, the 2nd issue is affirmatively answered. The argument by the Defendant that there was no oral agreement

concluded by herself and the second Plaintiff, Along that there was no breach of contract committed by the Defendant it is a statements from barthere is not piece of evidence showing that Khorshid A. Mulla was indeed not a shareholder or director of the Defendant, and consequently, he cannot enter into any contract on behalf of the company. The Defendant did not tender any document from Business Registration and Licensing Agency (BRELA), registrar of companies such as BRELA search report or extract from companies register showing the status of the Defendant, UNICORD (T) Limited that could have supported the allegations that the Khorshid A. Mullawas not a shareholder or Director of the defendant. In absence of such evidence, there is no way it can conclusively be determined that, Khorshid A. Mullawas not a director of the Defendant. It is trite law that, the court cannot make a finding basing on the document which was neither tendered nor admitted before it as exhibit.Worse still, the Defendant Company MEMART were not brought before the Court. Therefore, the allegation that Khorshid A. Mulla was neither the shareholder nor the director of the Defendant was not substantiated. In absence of any evidence to support it, it remains incredible. This legal position was stated by the Court of Appeal in the case of **SHEMSA AND TWO OTHERS v SELEMAN HAMED ABDALLAH, CIVIL APPEAL NO 82 OF 2012(UNEPPORTED)**.

In the circumstance, it cannot justifiably be said that Khorshid A. Mullawas not a director basing solely on DW1 testimony that he was not a shareholder or director of the Defendant which was unsubstantiated and hence incredible and unbelievable. The Defendant tendered nothing from BRELA. No company search report from BRELA was brought before the Court to show who were or currently are the directors of the

Defendant. According to Section 110 of the Evidence Act [Cap 6 R.E. 2019] he who alleges must prove.

The argument that the payment for sisal fibre container was paid to Nyanza General Supply (so called Defendant's sister company) does not imply that the Defendant did not receive the payment. PW1 testimony that the Defendant's officials acknowledged receiving the payment from the Plaintiffs was never discredited by the Defendant. Mindful of the fact that the Defendant is a private company (family business, the shareholders and directors were brothers), and to complicate the matter, the debt acknowledgement and payment plan was signed by Abdulrahim Mulla (one of the directors of the Defendant). The Defendant did not call him as her witness in this case.

(1) To what reliefs are the parties entitled to.

Having answered the first two issues on the affirmative, what follows is to determine as to what reliefs are the parties entitled to. The Plaintiffs have proved his claims on a balance of probability as required by Section 3(2)(b) of the Evidence Act [Cap 6 R.E. 2019]. The reliefs they sought are:

(1) Declaration that the Defendant has breached the contract. Indeed, there was a breach of contract. Thus, the same has been so declared by the Court when answering the second issue hereinabove.

(2) An order for specific performance of the contract or in alternative payment of USD 88,920 being the actual amount received by the Defendant in consideration of the two sisal fibre containers. Regarding, a sought order for specific performance of the contract which implies delivery of the two

sisal fibre containers, that requires the Court to consider the circumstances under which such order may be given. A few examples will be mentioned and elaborated before deciding. (i) Where the goods or services to be purchased are only supplied by the Defendant. In other words, the Defendant is the only supplier and there is no room for getting them from other suppliers. And the contract was thus concluded because of that. In **Hotel Travertine Limited M/S Gailey & Roberts [2009] T.L.R. 158** the Appellant's prayer for an order of specific performance was declined because the good to be supplied are ordinary articles of commerce which the buyer could obtain from elsewhere. In my view, sisal fibre are ordinary goods that can be obtained from other suppliers. (ii) Where there is a contract for service, and the Defendant is the only expert to render the services. As such the contract was concluded by the said expert (Defendant) because of his expertise. No other person can provide the service. The situations exemplified here in above do not apply in the case at hand. In addition, the Defendant failed to deliver the sisal fibre containers for a considerable period. To order the Defendant deliver the sisal fibre containers is to continue posing hardship. It will thus be unfair and unwarranted. I thus grant the alternative relief sought that is repayment of USD 88,920 being the actual amount the Defendant received in consideration of the two sisal fibre containers that were undelivered to the Plaintiff. The Defendant shall thus pay the 2nd Plaintiff USD 88,920.

(3) Thirdly the Plaintiffs prayed for an order of payment of USD 50,000 being expected profit had the Defendant supplied the said sisal fibre containers. I

am aware of the Common Law rule that is cherished in our jurisdiction that where a party sustains loss by reason of breach of contract he is so far as money can do it be placed in the same situation with respect to damages as if the contract had been performed. That was held in **Epimark Makoi and Prime Aloyce v Malawi Cargo Centres Limited [2010] TLR 146**. Admittedly, I have considered the evidence given and I have not found any piece of evidence that substantiates the claim of USD 50,000 as anticipated profit. The Plaintiffs failed to provide evidence to show that the said amount is the profit that they foresaw. It is not enough to merely claim certain amount as anticipated profit without substantiating it.

(4) General damages to be assessed by the Court. The Plaintiffs have also claimed general damages. Unlike specific damages that requires strict proof, general damages do not require the same. The latter is granted at the Court's discretion. In **IBM Tanzania Limited v Sunheralex Consulting Co. Ltd, Commercial Case No. 09 of 2020** the Court held that damages may be specific or general in nature. In that case like the present case the Plaintiff prayed to be paid general damages which need not to be specifically pleaded and proved. That is in accord with the case of **Zuberi Augustino Mugabe v Anicet Mugabe [1992] T.L.R. 137**. In my view the Plaintiffs deserve the general damages claimed because as it was held in **Hotel Travertine Limited v M/S Gailey & Roberts [2009] T.L.R. 158 at page** that *the guiding principle in assessing damages is to award the Plaintiff an amount of money that will, as nearly as money can, put him*

in the same position as if he had not been injured by the wrongful act of the Defendant. Having so observed from the authorities, and since the Plaintiffs have successfully proved their claim in this case, the general damages sought are granted. I proceed to grant that USD 50,000 that undoubtedly recompensate them for the loss they sustained due to the Defendant's breach of the contract.

(5) Interest at Court's rate from date of judgment to date of payment in full. The order sought is granted, that the Defendant shall pay the 2nd Plaintiff interest at 7% court rate from the date of judgment to the date of payment in full.

(6) The Plaintiffs shall also have their costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 24th Day of February, 2023.

U. J. AGATHO
JUDGE

24/02/2023

Date: 24/02/2023

Coram: Hon. U. J. Agatho J.

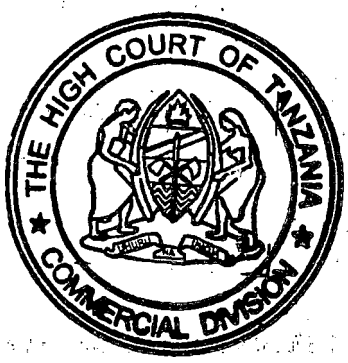
For Plaintiffs: Tesiel Kikoti, Advocate holding brief of Abubakar Salim, Advocate

For Defendant: Silvester Korosso, Advocate holding brief ofWillson Edward Ogunde, Advocate

C/Clerk: Sania

Court: Judgment delivered today this 24th February 2023 in the presence of Tesiel Kikoti, Advocate holding brief of Abubakar Salim counsel for the Plaintiffs,

and Silvester Korosso, Advocate holding brief of Willson Edward Ogunde, learned counsel for the Defendant.



U. J. AGATHO
JUDGE
24/02/2023