IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LEVIRA, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CIVIL APPEAL NO. 81 OF 2021

JUNIOR CONSTRUCTION COMPANY LIMITED..... APPELLANT

VERSUS

MANTRAC TANZANIA LIMITED..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)
(Fikirini, J.)

dated the 30th day of October, 2020

in

Commercial Case No. 10 of 2017

JUDGMENT OF THE COURT

12th March & 12th April, 2024

LEVIRA, J.A.:

This appeal is against the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam (the High Court), in Commercial Case No.10 of 2017. The respondent herein was the plaintiff and the appellant was a defendant; together with Suleiman Masoud Suleiman, Nchambi's Transporters Limited and Stamigold Company Limited who are not parties to this appeal. To harmonize the memorandum of appeal and the notice of appeal as to parties involved in this appeal, at the hearing of the appeal, Mr. Frank Mwalongo, learned advocate appearing for the appellants sought

leave of the Court to withdrawal the second and third appellants' appeal as their names were not included in the notice of appeal against the respondent. There being no objection from Mr. Roman S. L. Masumbuko, learned advocate for the respondent, we granted that leave. Therefore, the appeal was argued between the sole appellant in this appeal and the respondent.

The gist of the dispute between the parties which led to the impugned decision was nonpayment of the purchase price for the supply of 15 caterpillar machines (exhibit D2) delivered to the appellant by the respondent. According to the Credit Sale Agreement dated 12th May, 2015 parties herein agreed that the respondent would sell to the appellant 15 caterpillar machines identified as: 2x374D, 12x74D/745C and 1x336, subject to the terms and conditions appearing in the Agreement conforming to the relevant detailed technical specifications.

The agreed purchase price of the equipment/machines was United States Dollars (USD) Seven Million Five Hundred Thousand Two Hundred Seventy-Seven (USD 7,500,277) only. According to the Agreement, the appellant was required, on the signing date, to deposit with the respondent the sum of USD Two Million Four Hundred Thousand (USD 2,400,000.00) which was 30% of the purchase price while it was agreed that the remaining balance would be paid over a period of 16 months in equal

monthly installments of USD 341,181, starting one month after delivery of the equipment (15 machines). The appellant issued postdated cheques through CRDB Bank to the respondent as security for the prospective payments of the monthly installments.

The respondent delivered the 15 machines and the appellant received them, though they were of a slightly different make and were delivered out of the agreed time lines. Equally, the appellant failed to make payment instalments as per the Agreement. This fact prompted the respondent to institute Commercial Case No. 10 of 2017 in the High Court against the appellant and other three defendants as indicated earlier on, for the payment of USD 4,420,083.00 as an outstanding balance, and USD 191, 544.00 as interest on the outstanding balance and also for costs of the case.

While some of the respondent's claims were disputed through her written statement of defence (WSD), others were not disputed. Considering the manner in which the WSD was framed, the respondent urged the High Court to enter judgment on admission against the appellant on certain claims. The respondent's prayer was strongly opposed by the appellant. However, having heard the parties' arguments, on 14th August 2019, the High Court entered judgment on admission against the appellant. It ordered

the appellant to pay the respondent USD 3,091,864.816 constituting the balance of the purchase price for 15 supplied caterpillar machines.

The High Court then proceeded to determine the remaining disputed balance of USD 1,519,762.84 plus interest and other reliefs. On 30th November, 2020, it delivered its judgment (subject of the current appeal) in favour of the respondent. The judgment was not to the appellant's liking, hence the present appeal. At the onset and before hearing of the appeal could take place in earnest, Mr. Mwalongo informed the Court that the appellant was no longer interested to argue the third ground of appeal, hence abandoned it. Therefore, the following three grounds were argued:

> *1. That the Honourable Judge erred in law in holding that the appellant is liable after having established that it is the respondent who breached the credit sale agreement.*
>
> *2. That the Honourable Judge erred in law in finding the appellant liable to the respondent without establishing terms and conditions of contract for supply of equipment.*
>
> *3. That, the Honourable Judge erred in law in finding the appellant liable to pay the Respondent in an instance where the respondent had not even raised an invoice as decided.*

Mr. Mwalongo adopted the appellant's written submissions in support of the appeal and argued the first and second grounds of appeal conjointly.

His main argument was that the High Court erred in law in finding the agreement between the parties in this appeal to be an implied contract. He referred us to page 19 of the record of appeal with a view of showing that, the reliefs sought by the plaintiff (respondent) on specific payments were based on the Credit Sale Agreement between the parties herein. He added that, even the issues framed during trial, as can be seen on page 337 of the record of appeal, were based on breach of the Agreement.

Mr. Mwalongo argued vehemently that, having made a finding on page 342 of the record of appeal that, the said Agreement was no longer binding on the parties, it was not proper for the trial Judge to come up with the issue of implied contract between them. According to him, the High Court ought to have ended there because the plaint did not have any claim regarding implied contract between the parties herein.

Besides, he said, there was no issue framed on whether or not there was an implied contract. As such, its terms were not known and the parties were not given an opportunity to argue on it. He insisted that parties are bound by their pleadings. In addition, Mr. Mwalongo argued, the issue of sanctity of contract was as well erroneously introduced and determined by the High Court. As such, he insisted, since the first issue was answered in the negative by the High Court, the respondent lost the right to the relief of USD 1,519,762.84 and all other reliefs because they were specifically

claimed from the Credit Sale Agreement. In support of his argument, he cited the case of **Tanzania Saruji Corporation v. African Marble Co. Ltd** [2004] T.L.R. 155 and **NBC Holding Corporation v. Hamson Erasto Mrecha** [2000] T.L.R. 71.

Regarding the third ground of appeal, Mr. Mwalongo solely relied on the appellant's written submissions, in which he argued that, the Credit Sale Agreement on which the suit was based was declared not binding to the parties by the High Court. Therefore, the trial Judge had no reason to find a foreign justification to grant the reliefs. In this argument, he was referring to the invoices while emphasizing that, since no invoices were issued by the respondent to trigger a claim for payment, as required by law, the respondent was not entitled to any such reliefs.

In reply, Mr. Masumbuko urged the Court to consider the respondent's written submissions as part of his oral account against this appeal. He argued that the contract between the parties in this appeal was of sale of goods against which the appellant failed to fulfill her part of the bargain. According to him, the issue whether the Credit Sale Agreement was varied or not did not have any relevance to the claim as the appellant never disputed receiving 15 caterpillar machines and failed to pay the agreed purchase price in full. The only defence advanced in the WSD was late delivery of the machines. He added that the respondent claimed specific

damages which were proved and awarded. He referred us to page 342 of the record of appeal and submitted that the trial Judge observed that the parties carried on business regardless the defects or variations of the terms, and this did not absolve the appellant from paying as she observed that, the seller (respondent) delivered the 15 machines and the defendant (appellant) accepted them. As a result, the appellant was obliged to pay the whole of the purchase price in accordance to the Sale of Goods Act, Cap 214 R.E. 2019 (the SGA).

Mr. Masumbuko insisted that, had it been that the appellant was disputing the purchase price or denying delivery of the equipment, they ought to have rejected delivery and sued for damages, if there was any problem with the machines under section 37 of the SGA. In addition, he argued, the appellant did not raise any counter claim which means, the trial Judge was right to imply that the parties had agreed to proceed with the sale transaction, otherwise she would have returned the machines. In support of his argument, he cited the case of **J & H Ritchie Ltd v. Lloyd Ltd** [2007] All ER 352. Besides, Mr. Masumbuko averred that, since the appellant partially paid for the machines, she is estopped from denying validity of the sale transaction. Cementing his argument, he cited the case of **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultant & Two Others**, Civil Appeal No. 51 of 2016

(unreported). He concluded his argument in this ground by insisting that, the trial High Court was right to award damages regardless of the defects in performing the signed contract. Basing on his submission, he implored the Court to find the first and second grounds of appeal without merits.

Mr. Masumbuko's reply to the third ground of appeal was that the issue of invoice was an extraneous matter, and urged us not to consider it, as the same was not pleaded. According to him, the only defence that was advanced by the appellant was that the machines were delivered late, although the fact was not even proved. He cited the case of **Astepro Investment Co. Ltd v. Jawinga Company Limited**, Civil Appeal No. 8 of 2015 (unreported). Finally, he stated that, the liability of the appellant to pay the monthly instalments, which he failed, was fixed under Clause 2.2 of the Credit Sale Agreement. He thus prayed for the appeal to be dismissed with costs.

We have carefully considered submissions for and against this appeal and thoroughly examined the record of appeal. The question for our determination is whether the High Court Judge was justified to make a finding that the appellant breached an implied agreement without framing an issue in that respect and/ or according the parties a right to argue in that regard. It should be noted at the outset that, there is no dispute that the parties herein entered into a Credit Sale Agreement for the supply of 15

caterpillar machines on 12th May 2015. It is as well not disputed that the respondent supplied the appellant with the machines and she received them, though the same were not of the agreed brand/make. The record of appeal reveals further that the appellant partially paid the purchase price of the said machines and the respondent accepted such payment. As such, the terms of the Credit Sale Agreement were not fully adhered to by both parties. That notwithstanding, there is sufficient material in the record of appeal showing that there was a lawful and binding sale transaction between the parties falling squarely within the ambit of section 5 (1) of the SGA. For ease of reference, we reproduce the substance of the cited provision as hereunder:

> *"Subject to the provisions of this Act and of any other written law in that behalf, a contract of sale may be made in writing (either with or without seai) or by word of mouth, or* ***may be implied from the conduct of the parties."***

Therefore, the fact that the appellant partly paid the purchase price for the machines, shows that she knew her obligations under the commercial arrangement for which she had received 15 pieces of caterpillar machines. In her decision, the High Court Judge said that there was no binding contract between the parties because the appellant did not adhere to Clause 2.1 of the Credit Sale Agreement which required her to deposit

USD. 2,400,000.00 as 30% of the purchase price as agreed. On page 341 of the record of appeal the she stated:

> *"Failure of the first defendant to adhere to this term of the contract, affected the commencement and the end date of the sixteen (16) equal payments installments as well as the agreed amount of USD 341,181.00 (three hundred and forty-one thousand, one hundred and eighty-one US Dollar). The contract signing date couldn't align with the installment payment start date as stipulated in clause 2.1 of the agreement, and likewise could not align to the would be contractual date of the last installment payment. In light of the above contractual variations, the agreed installment amount of USD 341,181.00 was no more fitting, thus failing Clause 2.2 of the agreement. Therefore, whatever done later by the parties after the failed Clause 2.1 was contrary to the conditions illustrated in exhibit P1 or rather was no longer within the confines of the agreement as the Credit Sale Agreement was no longer supportive or binding on them".*

Despite what she stated above, the learned Judge considered the conduct of the parties and what took place between them and stated further as follows:

> *"The stated position, notwithstanding, it is evident that* ***the plaintiff and the 1st defendant still carried out a business transaction*** *whereby the plaintiff delivered*

to the 1st defendant the 15 machines ordered and in return the 1st defendant failed to complete the payment liability, resulting into the present suit. Under section 29 of the sale of Goods Act, Cap 214 RE 2002 (the Sale of Goods Act) parties in a business transaction have a duty to each other. In this particular instance ***since the seller delivered the 15 machines and the 1st defendant accepted them****, then the 1st defendant was /is obligated to pay the whole purchase price. Failure by the 1st defendant to indicate otherwise, the plaintiff was deemed to conclude that the buyer has accepted the goods."* [Emphasis added].

We were invited by the counsel for the appellant to hold that, since the High Court Judge made a finding, in the first quotation above, then the Credit Sale Agreement was no longer binding on the parties, and she ought not to have ordered the appellant to pay the outstanding balance of USD. 1,519,762.84. With respect, we are unable to agree with Mr. Mwalongo in that regard. We have observed from the record of appeal that, although the parties to the Credit Sale Agreement did not adhere fully to the terms of that contract, still they largely performed their obligations in fulfilment of their original intention to contract. In this case, from the correspondences, their conduct before the case was to be filed, the pleadings and even the evidence, it is clear that the intention of the appellant was to buy 15 caterpillar machines from the respondent at a purchase price of USD

7,500,277.00 and the intention of the respondent was to supply the machines at the same price, which she did. The intention of the parties was very clear, notwithstanding the fact that parties might have omitted to fulfill their obligations here and there. In other words, nothing in this case was able to defeat the parties' intention to trade. We think, this is what made the High Court Judge to hold that there was an implied contract between the appellant and the respondent. It might not necessarily mean "*implied contract*" in its literal meaning as Mr. Mwalongo would wish us to consider, but we are of the considered view that, at least the business transaction between the parties herein could have started somewhere. With this understanding, the idea of Credit Sale Agreement cannot be ignored completely. In **Mollel Electrical Contractors Limited v. Mantrac Tanzania Llmited**, Civil Appeal No. 394 of 2019 (unreported), while dealing with the issue of partial payment of the agreed sum, the Court had this to say:

> *"Besides, it will be instructive to restate the trial court's reasoning on this aspect that, in terms of section 5 (1) of the SGA, the proforma invoices (Exhibit P5) and the purchase orders (Exhibits P1 and P4), exhibiting an offer and an acceptance by the appellant, constituted the contract. That fact is further supported by the emails (Exhibit P6) exchanged by the parties over the respondent's claim for payment of the alleged balance.*

Our impression from the emails is unmistakably that the parties acknowledged the existence of the contractual relationship between them while they wrangled over the alleged delayed payment of the balance."

We are fortified by the position we took in the cited matter and hold, in the present matter that, as the appellant does not deny the fact that she received 15 machines from the respondent without any expression of dissatisfaction or rejection and made part payment of the purchase price for those machines, this was perfectly a contractual obligation. The issue that follows in the circumstances, is whether the appellant was obliged to pay the said balance for the supplied machines as per the business arrangement as originally conceived by the parties. The fact that the appellant issued postdated cheques ostensibly to settle the outstanding obligation serves to fortify our view.

In this respect, particularly, since the appellant received the machines from the respondent and continued to use them without showing any dissatisfaction or rejecting them, then she is obliged to pay the balance of the purchase price regardless of the fact that the purchase price was negotiated at the time of entering Credit Sale Agreement which was eventually, declared not binding by the High Court. We entertain no doubt

that, the appellant knew in advance what is due as established by (exhibit P3 collectively) the cheques and postdated cheques she issued.

Having held so, we do not find a need to deal with the third ground of appeal as the first ground is sufficient to dispose of the appeal. Consequently, we dismiss the entire appeal with costs.

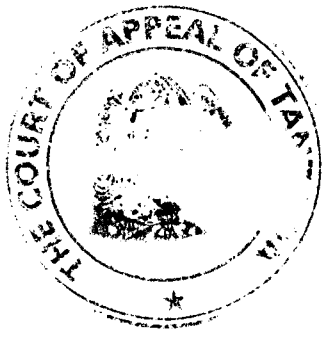
DATED at **DAR ES SALAAM** this 9th day of April, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 12th day of April, 2024 in the presence of Mr. Halima Semanda, counsel for the Appellants, and Mr. Fraterine L. Munale, counsel for the Respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL