IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SHINYANGA - SUB REGISTRY

AT SHINYANGA

PC. CIVIL APPEAL NO.63 OF 2023

(Arising from Land Appeal No. 61 of 2022 from Shinyanga District Court and Original Civil Case No. 41 of 2022 of Primary Court of Shinyanga at Shinyanga Urban)

THEONESIA BERNARD ..... APPELLANT

VERSUS

DAUDI SARYA .....RESPONDENT

JUDGMENT

14th & 23rd February 2024

F.H. MAHIMBALI, J

In what can be said as an endless battle of the parties unnecessarily, this is one. The appellant had originally rented a business table (at Market) to the respondent at an agreed amount of 50,000/= per month as renting cost, the former having obtained it from Municipal Authority of Shinyanga. In essence, the appellant is the recognized tenant of the Shinyanga Municipal Authority, whereas the respondent, became sub tenant. For known reasons to the appellant, he entered an agreement with the respondent for him to surrender that business table completely to him, but at a consideration of

4,000,000/=. As consideration to that agreement, the respondent paid 2,400,000/=, thus remaining with the unpaid balance of 1,600,000/=.

On the date of final payment, the respondent had no that balance to finalize the deal as the appellant kept on pressing for the completion the sooner and no later. In the course, it was finally resolved that if the appellant cannot hold tolerance, then he should refund the paid sum of TZS 2,400,000/=. The appellant too failed. That notwithstanding, he took his table, chased the respondent and subsequently; unsuccessfully filed a suit against the respondent for breach of contract (vide **civil case no. 10 of 2022 and its appeal no. 30 of 2022 of the same two lower courts**). However, the first appellate court in its former appeal (Civil Appeal No. 30 of 2022), directed that as there was no counter claim by the respondent, the payment of 2,400,000/= was not automatic but on a specific claim by case.

In pressing for the refund of the paid sum of 2,400,000/=, the respondent successfully filed his claims for refund before the trial court, which decision was upheld by the first appellate court. Undaunted with the first appellate court's decision, the appellant has knocked the doors of this court on four grounds, which when digested, they boil into two main grounds:

1. The first appellate court erred in analyzing the evidence of the case at the trial court and that it is wrong that the respondent's evidence is heavier than that of the appellant.
2. The first appellate court failed to consider the appellant's grounds of appeal.

On the second limb of ground of appeal, I had to visit the first appellate court's record, to satisfy myself what were the grounds of appeal preferred by the appellant before it. I have seen five of them, however a careful scan of them, the same boil into one major ground: Whether there was a breach of contract, and whether there were any damages established.

Though the first appellate court had not traversed the grounds of appeal serially as lodged, he grouped them into one bowl and discussed them whether the claims for the breach of contract was established. He was satisfied so, and replied in affirmative upholding the findings of the trial court.

It is trite law that where there are concurrent findings of two lower courts (trial court and first appellate court) on a question of fact, the second appellate Court will rarely interfere with concurrent findings of fact made by

the courts below. The exceptions to the rule are when the findings are perverse or demonstrably wrong and occasioning miscarriage of justice. This position was well stated **in Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149; **Mussa Mwaikunda v. Republic** [2006] TLR 387 and **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported). Specifically, in the latter case the Court stated that:

> *"... The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

Therefore, in determining this appeal, I shall be guided by the above principle.

In my clear traverse, I have not found one, thus this ground of appeal is dismissed.

As regards to the question whether the two courts below failed to analyze the appellant's evidence and thus arrived at a wrong premise; as ruled in the first finding above, that doing so would be interfering with the concurrent findings of the two lower courts. Do I have any legal justification for that? Is there any misapprehension of the facts of the case and its evidence?

To reply this, I had to visit the trial court's evidence and see what was the evidence and the possible misapprehension. In essence scanning the evidence of SM1, SM2 and that of SU1, it is undisputed that the appellant had originally rented a business table (at Market) to the respondent at an agreed amount of 50,000/= per month as renting cost, the former having obtained the it from Municipal Authority of Shinyanga. For known reasons to the appellant, he later reached an agreement with the respondent for him to surrender that business table completely to him, but at a consideration of 4,000,000/=. As consideration to that agreement, the respondent made down payment of 2,400,000/=, thus remaining with the unpaid balance of 1,600,000/= (see the evidence of SM1 and SM2).

On the date of final payment, the respondent had no that balance of finalizing the deal as the respondent kept on pressing for the completion without further extension. In the course, it was finally resolved that if the appellant cannot hold tolerance, then he should refund the paid sum of TZS 2,400,000/=. The appellant too failed (SM2). That notwithstanding, he took his table, chased the respondent and subsequently; unsuccessfully filed a suit against the respondent for breach of contract.

The appellant's own testimony at the trial court goes this way:

> *"...Suala hili tulishauriwa na watu tofauti tofauti lakini ilishindikana, nilimpa nafasi mbili tu: moja arudi kuwa mpangaji na nimkate fedha zake alizokuwa amenipa au nimkusanyie fedha yake nimpe, lakini SM1 alikataa na kudai fedha zake. Nilishindwa kumlipa sababu nilikua nadaiwa...."*

My take is, in this matter, the parties had been in oral contractual relationship. The challenge with it, is this, the same has no known terms in the event of breach or none performance of their contract. What then are the legal consequences? Is there refund or? If there are no such specific

terms, the assumption is, the parties had not intended for that but only the performance of the contract. As it is evident that the appellant had not tolerated for the full satisfaction of the payment but resorted to the breach of contract by taking his business table and chased the respondent, and as there had already been part payment above half pay, then that is a good consideration of the contract. The appellant had either in such circumstances of the breach of the contract to reimburse the respondent by deducting the possible costs/damages and then proceed with his own business or find another buyer. In the absence of clear specific terms of the contract, then the law on equity dictates that, there be balance of convenience. Since the appellant had not exercised any of the possible options, by him rushing to court (vide civil case no. 10 of 2022 and its appeal no. 30 of 2022), had himself no clean hands as he failed to exercise the possible two options. He never made him tenant nor refunded him his purchase price on breach. One cannot eat his cake and have it alive, it is like benefiting from own's wrong. That is not equity and I will not allow it. So long as in this matter the respondent suffered wrong by the appellant's acts, the law protects him vigilantly, as to any breach of contract, an innocent party is entitled to

remedy on breach of the contractual obligation by the breaching party (appellant).

All this said and done, it is clear from recorded evidence of the case at the trial court, that the respondent had a stronger case than the appellant and was thus justified of the verdict reached. This appeal is therefore brought without any justifiable cause, and the same is hereby dismissed with costs.

DATED at SHINYANGA this 23rd day of February, 2024.

F.H. MAHIMBALI

Judge