IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO.03 OF 2020

OMEGA FISH LTD ..... APPELLANT

VERSUS

A & E SECURITY LTD ..... RESPONDENT

JUDGMENT

14th July, & 2nd September, 2021

ISMAIL, J.

The appellant in this matter was the defendant in a suit for a claim which founded on a contract. In the said suit (Civil Case No. 33 of 2017), the appellant featured as the defendant, while the respondent was the plaintiff. Assorted orders were prayed and granted as follows:

(i) Payment of the sum of TZS. 10,736,820/-, being payment for specific damages for the outstanding amount for security services allegedly rendered to the appellant;

(ii) Payment of general damages, in the sum of TZS. 20,970,300/- for breach of contract;

(iii) Interest on the decretal sum at 18% per annum from the date of instituting the suit to the date of judgment;

(iv) Interest on the decretal sum at the court's rate of 7% from the date of judgment to the date of full satisfaction.

(v) Costs of the matter.

The contract whose alleged breach culminated into the trial proceedings was for provision of security services at the appellant's premises. It was entered orally between the parties in November, 2015. Midway through the contract term, allegations of breach of contract were raised by the respondent. The instances ranged from non-payment of the contract sum when it fell due, to unilateral deduction and retention of the said sums from the monthly bills raised by the respondent. The misunderstanding between the parties grew and reached the climax on 24th March, 2017, when the respondent issued a thirty-day notice of intention to terminate the contract.

After the trial that saw the respondent marshal the attendance of two witnesses against one for the appellant, the trial court found for the respondent. The trial court acceded to the prayer for payment of TZS. 10,736,820/- as specific damages; the sum of TZS. 5,000,000/- that

constituted general damages; and interest on the decretal sum at 7% per year.

It is this decision that has bemused the appellant, hence its decision to institute the instant appeal. Five grounds of appeal have been raised, as reproduced hereunder:

1. *That the trial court erred in law for pronouncing/entering the judgment in favour of the respondent based on documents collectively admitted as exhibit "A-5", "A-6" and "A-8".*
2. *That the trial court erred in law for pronouncing/entering the judgment in favour of the respondent based on generalized/personal opinion/statements or extraneous matters not revealed in the evidence on record.*
3. *That the trial court erred in law in granting of Tshs. 10,736,820/= which was not specifically pleaded and proved by the respondent.*
4. *That the trial court erred in law for arriving at a finding that the appellant breached the security agreement for non-renewal thereof without supportive evidence to that effect.*
5. *That the trial court erred in law for awarding the payment of compensation of Tshs. 5,000,000/= to the respondent without proof/evidence of breach of agreement by the appellant.*

Hearing of the appeal was done by way of written submissions, preferred consistent with the schedule for filing of the submissions.

Mr. Constantine Mutalemwa, learned counsel for the appellant, chose to argue grounds one, two, three and five generally and in a combined fashion. He argued that, while the respondent paraded two witnesses and four invoices which were tendered collectively and admitted as exhibits A-5 and A-6, the tendering and admission of the exhibits in the collective fashion was irregular and in contravention of the rules of evidence. The resultant consequence of all this, the counsel argued, is to render the exhibits liable to being expunged from the record. Mr. Mutalemwa relied on the Court of Appeal's decision in ***Anthony M. Masanga v. Penina (Mama Mgesi) & Lucia (Mama Anna)***, CAT-Civil Appeal No. 118 of 2014 (unreported).

Expounding further on the consequence of irregular tendering of the evidence, Mr. Mutalemwa held the view that if the documentary exhibits (A-5, A-6 and A-8) are expunged from the record, the respondent's claim of TZS. 10,736,820/- will remain unproven. Regarding exhibit A-8, the counsel's contention is that these contain a statement of account and receipts, all of which were collectively admitted in the record of the proceedings. He argued that, while PW2 testified and prayed to tender the receipts and invoices as mentioned in exhibit A-8, there is no subsequent court order admitting such documents as exhibits. Mr. Mutalemwa further contended that the court record contains three invoice books and four receipt books which were

neither marked nor was there an order of the court to indicate that the same were admitted as evidence.

Mr. Mutalemwa held the view that if exhibits A-5 and A-8 are cast-away, the oral testimony of PW1 and PW1 cannot substitute the documentary evidence required to prove the claim. This is in terms of sections 61, 63 and 66 of the Law of Evidence Act, Cap. 6 R.E. 2019. The counsel contended that the net effect of all this is that the claim of TZS. 10,736,820/- is unproven.

With regards to claims for the security services and deductions of TZS. 20,970,300/-, allegedly deducted without the respondent's consent, the counsel's argument is that, since invoices which would prove the claim were not tendered in court, such claims were not proved.

Submitting on ground four of the appeal, the learned counsel argued that PW1 and PW2 did not prove and pray for payment of general damages to the tune of TZS. 5,000,000/-, awarded by the trial court. While relying on the definition of compensatory damages found in the Black's Law Dictionary, 8th Edition, p. 416, Mr. Mutalemwa contended that the respondent does not deserve any form of compensation because the available testimony is that the contract was terminated at the instance of the respondent when it chose to stop rendering services. He argued that payment of damages would mean

benefiting the respondent from its own wrongful act of terminating the agreement. The counsel argued further that lack of supporting evidence rendered the award of general damages untenable. On this, the counsel relied on the decision in ***Ashraf Arber Khan v. Ravji Govid Varsan***, CAT-Civil Appeal No. 5 of 2017 (unreported), in which it was held:

> *"... The law is settled that general damages awa awarded by the trial judge after consideration and deliberation on evidence to justify the award. The judge has discretion in the award of damages. However, the judge must assign reason."*

In consequence of all this, the appellant urged the Court to allow the appeal and quash the judgment and set aside the decree dated 30th December, 2016.

The respondent's submission in respect of grounds 1-4 of the appeal, was full of stunning concession that the procedural aspects that govern adduction of documentary evidence were not conformed to. Mr. Dutu Chebwa, its counsel, argued that the procedure and practice require that documentary evidence should dealt with one after the other. In this case, the said adduction of the documents was lumped and done cumulatively, contrary to Order XIII Rules 4 (1) and 7 (1) and (2) of the Civil Procedure Code, Cap. 33 R.E 2019 (CPC). The learned counsel argued that, going

by the proceedings, it is evident that none of the said documents was properly tendered and admitted, and that the same were neither endorsed nor were they numbered. He argued that it was erroneous for the trial court to rely on documents whose tendering was not compliant with the law. Mr. Chebwa especially singled out exhibits A-8 whose modality of endorsing and naming was not clear.

The learned counsel was quick to point out, however, that after the said documents were tendered, the appellant was given an opportunity to cross examine the witness on the tendered documents. He held the view that no prejudice or injustice had been suffered by the parties. The counsel buttressed his contention by citing the decision in the English case of ***Cooper v. Smith*** [1884] 26 Ch. D. 700, in which it was held:

> *"Now, I think it is a well-established principle that the object of courts is to decide the rights of parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by other division of the Court of Appeal and by myself as a member of it, I known of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought to correct, it can be done without injustice to the other party, Courts do exist for the sake of deciding matters in controversy."*

Mr. Chebwa urged the Court to invoke the provisions of section 3A of the CPC, together with the cited decision and nullify the trial court's decision, and order nullification of the proceedings and order a re-trial. The counsel's view is predicated on the decision of the Court of Appeal of Tanzania in ***M/S SDV Transami (Tanzania) Limited v. M/S STE DATCO***, CAT-Civil Appeal No. 16 of 2011 (unreported). Mr. Chebwa argued, in the alternative, that expunging of the documents erroneously admitted would still leave a residual evidence which is sufficient to ground a decision in the respondent's favour. This is the testimony of PW1 and PW2. He argued that the claim was further proved by exhibit A-4 which is an acknowledgment letter, accompanied by the invoice from the appellant. The counsel further argued that the appellant does not deny the fact that the respondent has a claim against the appellant. This, he contended, is clear from exhibit A-4, a letter from Matata and Company Advocates. He concluded that the decision of the trial court was based on the oral and documentary testimony adduced by the parties and not the trial magistrate's personal statement or opinion.

Submitting on ground five of the appeal, Mr. Chebwa contended that the trial court was right to award compensation to the tune of TZS. 5,000,000/-. His argument was predicated on the trite position that award

of general damages is the court's discretion and need not be proved. The counsel fortified his position by citing the case of ***Cooper Motor Corporation v. Moshi/Arusha Occupational Health Services*** [1990] TLR No. 96.

The learned counsel argued that award of general damages was one of the reliefs sought by the respondent, and PW1 testified and prayed that the Court awards the sum of TZS. 20,000,000/-. It was the counsel's argument that, since the appellant breached the contract by failing to pay the contract sum as agreed, the respondent was entitled to general damages. He argued that, since the settled position is that award of general damages can only be interfered with where the appellate court is satisfied that the trial court applied a wrong principle, it is his prayer that the damages awarded should not be interfered with.

He rested his case by urging the Court to either dismiss the appeal with costs or order a retiral as an alternative.

In rejoinder, Mr. Mutalemwa reiterated what he submitted in the submission in chief. He argued that, in view of the respondent's concession that there was a gross mishandling of the documentary exhibits, manifested in the improper production and admission of evidence, the appeal ought to succeed. The counsel argued that he is in concurrence with the respondent's

counsel's view that the impugned judgement, the proceedings and decree of the trial court be set aside. to allow for trial *de novo* before another magistrate.

From the counsel's rival submissions, the singular issue for determination is whether the appeal raises any meritorious position. Deducing from these submissions, the clear picture is that the contention revolves around tendering and admission of documents which constituted part of the respondent's evidence.

As rightly conceded by Mr. Chebwa, the tendering and admission of exhibits A-5 and A-6, was shrouded in wanton violation of the rules that govern admissibility of documents. This violation was amply discussed in ***Anthony Masanga v. Penina (Mama Mgesi) & Another*** (supra), and the consequence that was emphasized in the said case is that such documents, in this case exhibits A-5 and A-6, are liable to expunging from the record. This contention is shared by Mr. Chebwa who argued that there is still a residual testimony as adduced by PW1 and PW2. As Mr. Mutalemwa stated this would be a violation of the provisions of sections 60, 63 and 66 of the Evidence Act (supra).

There is also an issue with respect to exhibit A-8. The argument raised by Mr. Mutalemwa is that, while PW2 testified and prayed to tender the

documents, which were later christened as exhibit A-8, there was no order that admitted them as such. The documents falling under this head of documentary testimony are the invoice and receipt books. These justify the quantum claimed by the respondent as special damages. But, as it were, these documents found their way into the file through irregular means which renders the same unworthy of any consideration.

What then follows is the determination of the consequence of the horrendous conduct committed by the trial court. Both counsel are of a unison thinking with respect to the consequences of the cited infraction, and they are both right. It is simply that this is a fundamental error that has the consequence of vitiating the proceedings and bring both parties to the drawing board. This position is consistent with the settled position as accentuated in numerous decisions of the Court of Appeal. In ***Japan International Cooperation Agency v. Khaki Complex Ltd*** [2006] TLR 343, the Court of Appeal of Tanzania held as follows:

> *"Dr. Lamwai, with deep conviction submitted that even though the documents are not considered by the Court, yet there is sufficient oral evidence to entitle this Court to affirm the decision. With greatest respect to the learned advocate, the documents as essential to the case and without them the trial judge could not have arrived at the decision he did. The inevitable conclusion is that the evidence properly*

before the Trial Court did not justify the learned judge's affirmative answers to the first and second issues before him. We have seriously considered what course of action we should take under the circumstances. This is not the case of improper admission or rejection of evidence. The documents in question somehow were not admitted in evidence. This was a substantial error during the trial which amounted to a miscarriage of justice.

In the result, we allow the appeal and order retrial before another judge."

The position laid down in the foregoing decision was underscored in the case of ***M/S SDV Transami (Tanzania) Limited v. M/S STE DATCO*** (supra) cited by Mr. Chebwa. In the latter, the appeal was adjudged incompetent on account of mishandling of the documentary exhibits by the trial court, rendering the proceedings a complete nullity. This is the path I am inclined to walk through. I hold that the cited incidents of mishandling of documentary exhibits in this case have the effect of rendering the trial proceedings a complete nullity.

In the upshot, this appeal succeeds. Consequently, I order that the proceedings in Civil Case No. 33 of 2017 be and are hereby nullified, simultaneous with setting aside the judgment and decree emanating

therefrom. The matter is remitted to the trial court for a trial *de novo* before another magistrate. I make no order as to costs.

Order accordingly.

DATED at **MWANZA** this 2nd day of September, 2021.

M.K. ISMAIL

JUDGE