IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

PC CIVIL APPEAL NO. 25 OF 2022

(Appeal from Judgment of the District Court of Monduli, Civil Appeal No. 10 of 2021 dated 14th April, 2021 (Hon. E.K. Mutasi, RM), C/F Kisongo Primary Court in Civil Case No. 10 of 2021)

ARUSHA ART LIMITED ..... APPELLANT

VESUS

GEM ROCK VENTURE CO. LTD.....RESPONDENT

JUDGMENT

26/01/2022 & 23/02/2022

MWASEBA, J.

This is the second appeal filed before this court by the appellant hereinabove. Before Kisongo Primary court the appellant sued the respondent for breach of contract claiming for Tshs. 50,000,0000/= being a payment he advanced to the respondent for drilling a borehole. The trial court's findings were that a respondent did not breach the contract as he accomplished his duty, but it was the appellant who installed a pump in the borehole against the respondent's instruction.

He unsuccessfully appealed to the district court which upheld the decision of the trial court hence this second appeal.

Before this court the appellant has raised five (5) grounds of appeal as follows:

1. *That, the trial court and the first appellate court erred in law and fact by failing to appreciate the gist of the party's contention (Litis Contestation) which was not merely borehole completion and water availability but rather borehole constructed below specified standards ultimately causing faulty borehole pump placement rendering the entire borehole unusable.*
2. *That the Honourable Magistrate erred in law and fact by holding that the trial court did not error in holding that there was no contract between the parties and that, the records does not show specifications of the measurements of the borehole notwithstanding the overwhelming evidence, documentary and oral to the contrary including respondents' own admission and testamentary proof to the contrary including Exhibit D6.*
3. *That, the first appeal being in form of rehearing and the Honourable magistrate having restated the first appellate court's duty to reevaluate the evidence, he erred in law by failing to*

properly reevaluate the evidence of the trial court and thereby arriving at an erroneous decision upholding the decision of the trial court.

4. *That Honorable Magistrate erred in law in not holding that, Respondent's testimony offended Rule 14 (1) of the Magistrate's Courts (Rules of Evidence in Primary Courts) Regulations G.N No. 22 of 1964.*
5. *That, Honorable Magistrate erred in law and fact in not holding that judgment of the Trial court was contradictory, problematic and based on extraneous matter.*

When the appeal was called for hearing, Mr Wilberd Massawe, Learned Counsel represented the appellant whilst Mr Mpaya Kamara, Learned Counsel, appeared for the respondent. With the leave of the court, the appeal was argued by way of written submissions.

Supporting the appeal, Mr Wilberd Massawe abandoned the 4th ground of appeal and proceeded to argue the first, second and third grounds jointly. He argued that the evidence of the appellant at the trial court was so strong as it is seen at page 3 of the trial court proceedings and from the said evidence five things can be deduced as per the parties' agreement. **First**, the agreement was to drill 200 meters but only 185

meters was drilled, **second and third**, the wall diameter was to be 6 inches to accommodate water pump, but the respondent drilled 5 inches. **Four**, the water pump was purchased based on the respondent's advice and **five** the installation of the water pump was botched due to the unwanted size of the borehole drilled by the respondent.

It was his further submission that the deployment and placement of water pump blocked the water flow which rendered the entire borehole unusable and led to the present case. He added that the depth of the borehole remained unchallenged as evidenced by Exhibit D1 and even the respondent admitted that there was an agreement before drilling the borehole which includes all the specified standards. More to that the specified "5 inches inside and 6 inches outside" was the invention of the respondent without involving the appellant which is contrary to exhibit D1 (conditions and terms of contract). He supported his arguments with the case of **Lulu Victor Kayombo vs Oceanic Bay Limited, Mchinga Bay Limited**, Consolidated Civil Appeals No. 22 & 155 of 2020 (Unreported) which stated that where there is an oral contract and a written one, the later prevail.

Mr Massawe went on submitting that the decision of the trial court was contrary to the evidence on records because there was a specific

agreement which were supposed to be executed by both parties. More to that, he argued that there was no need to have two separate agreements commanding the respondent, he was supposed to follow the agreements stipulate in Exhibit D1. It was his further submission that, both the trial court and the first appellate court failed to see that the omission of not following the specified measures did cost the appellant a water pump and the entire well. His argument was well supported with the case of **Lulu Victor Kayombo vs Oceanic Bay Limited, Mchinga Bay Limited (supra)** where it was held that courts are not allowed to change contractual clauses which agreed between the parties.

He argued further that both the trial court and the 1st appellate court ignored Exhibit D1 and relied on Exhibit D6 and went on ignoring the evidence of Francis Sebastian Malley. This argument was supported with the case of **Omary Abdallah Kilua vs Joseph Rashid Mtunguja**, Civil Appeal No. 178/2019 (Unreported).

Opposing the appeal, Mr Mpaya Kamara argued that there is no need to quash and set aside the decision of the 1st appellate court and the trial court as there was neither miscarriage of justice nor misapprehension of evidence or violation of principles of law and procedure. To cement his

argument, he cited the case of **Samwel Kimaro vs Hidaya Didas**, Civil Appel No. 271of 2018.

Responding to the first, second and third grounds of appeal, Mr Kamara avowed that, the appellant is now changing his case, since at the trial court his claim was that the borehole which the respondent drilled did not yield water and now his claim is that the borehole stopped to yield water after faulty installation of water pump. It was his further submission that the claim of 50,000,000/= by the appellant was not supported by any document since Exhibit D1 "Borehole Drilling Quotation" was for Tshs. 31,000,000/=. Further to that the trial court records proves that there was no such kind of agreement and more to that there was contradiction between the appellant's witnesses (PW1 and PW2) regarding the agreed diameter of the borehole. While PW1 said the agreed diameter was 6 inches, PW2 testified that it was 5 inches and the machine which was bought was for 6 inches and not 5 inches. Thus, at the trial court the appellant failed to show any written contract which proved the agreed specific measurements of the borehole.

It was his further submission that, exhibit D1 was not an agreement between the parties but rather, it was prepared and produced by the

respondent that's why it has no stamp duty and further to that it did not support the claim of Tshs. 50,000,000/=. He argued further that, the loss of the 2nd borehole is totally on the appellant's fault to opt for unskilled person instead of the respondent herein and he had to blame himself for that. He was of the view that, if he could have used the respondent's skill, the borehole could have still function perfectly. It was his submission that parties are bound by their pleadings and are not allowed to vacate from it. He supported his argument with the case of **Agatha Mshote vs Edson Emmanuel & 10 Others**, Civil Appeal No. 121 of 201.

Coming to the last ground of appeal, Mr Massawe for the appellant submitted that it is a trite law that the findings by the trial court must be in consonance of with the facts available on record. That means the judgment must be capable of effectively disposing the matter at hand. Thus, he agreed that the remarks by the trial magistrate at the end of judgment that the appellant did not pay taxes was not supported with any evidence on records. It was simply uncalled for and was extraneous to the records and ought not to have been placed at the judgment.

In the end, he prayed for the court to reverse the decision of the 1st appellate court together with that of the trial court and order the

respondent to either rectify the borehole, pay the appellant costs of restoring or contract another borehole or refund the appellant the costs of construction.

Responding to this ground, Mr Kamara stated that in this ground the appellant is trying to invite the court to decide on things which was not yet decided, he prayed for the court to decline his prayer. To cement his argument, he cited the case of **Mantra Tanzania Limited vs Joaquim P. Bonaventure**, Civil Application No. 385/01 of 2020 (Unreported) which insisted the court to decide on the matter which are presented before it and the circumstances prevailing on each case. Further to that, even the remarks of the court complained by the appellant was just an *orbiter-dictum* and did not form part of the *ratio-decidendi* of the decision of the court and no appeal can lie on that. They prayed for the appeal to be dismissed with costs.

In brief rejoinder, Mr Massawe apart from reiterating what he had already submitted in chief, he added that the quotation tendered by the respondent and signed by the appellant forms the basis under which the borehole was to be constructed. As for the claim of 50,000,000/= he argued that it was the value of the suit for adjudication purpose, the real claim will be deducted from the facts of the claim. More to that, he

submitted that they have not introduced new issues as alleged but they submitted what is clearly on records.

Having considered submissions from both parties and the record, the pertinent issue for consideration is whether this appeal has merit.

Starting with the first ground of appeal, this court noted that the appellant is challenging that a borehole was drilled below specific standard that's why it has no water and that is why he is claiming for a refund or construction of a new borehole from the respondent. Having gone through the trial court records this court noted that the respondent was a company expertise in Drilling boreholes and as per Exhibit D6 there was a specific measurement of the borehole which the respondent alleged that a borehole was drilled based on the said measurement. Thus, this court is of the firm view that to challenge that a borehole was drilled below standards the appellant was supposed to bring an expert in drilling boreholes who could have been a better person to explain in detail if a borehole was drilled below standard or not. In his evidence he stated that an expert told them that the borehole was built below the standards, however the said expert was not among the appellant's witnesses at the trial court. In the case of **Sylevester Stephano vs**

The Republic, Criminal Appeal No. 527 of 2016 (CAT at Arusha, reported at Tanzlii) it was held that:

> *"The evidence of an expert is likely to carry more weight than that of an ordinary witness."*

Thus, guided by the cited authority this court is of the firm view that without expert evidence the allegation of the appellant will just be an afterthought as he measures the well with his bare eyes without any expertise measurement. Therefore, this court do agree with the 1st appellate court that the appellant failed to prove his claim as per **Section 110 of the law of Evidence Act**, cap 6, R.E 2019 which require a person who alleges to prove on the balance of probabilities.

Coming to the second ground of appeal, the appellant complained that the 1st appellate court erred in law to rule out that there was no contract on specific measurement despite of the evidence tendered in court. Having revisited the record, there is no dispute that the parties herein entered a contract. But the same was an oral contract to construct a borehole and therefore the specification are stipulated in the exhibit D6 which is a well data sheet. Looking at the judgment of the 1st appellate court, it was held that the appellant did not show or tender any contract showing specification of the measurements of the borehole.

Nevertheless, the existence of the measurements of the borehole alone cannot be a proof that a borehole was drilled below standard. It was explained by the third appellants witness (SM3) at the trial court that, and I wish to quote for easy of reference:

> *"Wakati pampu inawekwa mimi sikuwepo lakini nilipata taarifa kuwa iliwekwa na Arusha Arts, pampu zilizotumika sio zenyewe zimekosewa, ni za nchi 5 sio za nchi 6, Mtaalamu alikagua akagundua makosa yaliyofanyika pampu zilizotumika sio zenyewe. Mtaalamu aliletwa akague kwasababu pampu ilisumbua kuiweka, alikagua tarehe 5/11/2020."*

Thus, based on the cited evidence the problem here was not the contract between the parties or the measurements of the borehole but with the pump which was placed on the borehole contrary to its measurement which led to block the passage of the water after the pump was installed.

As for the third ground of appeal, the same has no merit since the 1st appellate court did analyse and evaluate the evidence placed before it that's why it came up with a decision that the appellant failed to prove his case on the balance of probabilities.

As for the last ground of appeal, Mr Massawe complained that the 1st appellate court failed to notice that the judgment of the trial court was contradictory, Problematic and based on extraneous matter since it was not consonant with the facts on records. Upon revisiting the trial court judgment this court noted that, there was no contradictory, problematic or extraneous matters and the same was the findings of the 1st appellate court. More to that, this court do agree with the appellant's counsel that the *Obiter dictum* added by the trial Magistrate that the appellant did not pay government tax and they had to sit with the respondent to solve some of the issues was not supported by the testimonies of the parties. However, the same does not form part of decision and hence an appeal cannot rely on it as it was just an advice and not binding to the parties. The same was held in the case of **Nelson Mayombo and Another vs Halima Yasini Masanja**, Land Appeal No. 35 OF 2021 (HC- reported at Tanzlii) that:

> *"The court or tribunal may have an obita dicta, which does not bind the court or is not part of stare decisis."*

See also the case of **Godwin Lyaki and Another vs Ardhi University**, Misc. Civil Application No. 242 Of 2020 and **Donald**

Patrick vs Mtendaji wa Kijiji Kiriba, Civil Appeal No. 1 of 2020 (HC-both reported at Tanzlii).

Thus, being persuaded by the cited authorities, the cited part of the decision by the appellant is *obiter dictum* with no legal effect as it does not form part of the decision, thus cannot be appealed against. So, this court finds no merit on this ground too.

Having discussed above, this court finds that the appeal before this court is baseless and therefore it is dismissed for lack of merit. Costs to be borne by the appellant.

It is so ordered.

DATED at **ARUSHA** this 23rd day of February, 2023.

N.R. MWASEBA

JUDGE

23/02/2023