IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO,J.A, ORIYO,J.A., And KAIJAGE,J.A.)

CIVIL APPEAL NO. 5 OF 2009

FUTURE CENTURY LIMITED.....APPELLANT

VERSUS

TANESCO.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, Commercial Division)

(Mjasiri, J.)

dated the 18th June, 2007

in

Commercial Case No. 58 of 2006

.....

JUDGMENT OF THE COURT

11th June 2015 & 10th February, 2016

KIMARO, J.A.:

The National Service Construction Department (NSCD) was contracted to build 25 blocks of eight apartments for residential occupation by employees of the President's office at Kijitonyama Makumbusho area. The NSCD also contracted the appellant to supply, install, test and commission power supply to the blocks (Exhibit P.1). The respondent's obligation, as it

has always been, was to supply and distribute electricity into the blocks. The appellant did the work. The respondent was required to install two bulky meters (KVA meters) to enable the flow of electricity to the blocks. The respondent refused to install the meters and required the appellant in writing, as per exhibit P6, to explain where it obtained the materials for carrying out the project because they had marks for TANESCO; an indication that they belonged to the respondent. The appellant's contention was that the refusal by the respondent to install the bulky meters was unjustified because it supervised the project throughout, from the time the appellant started doing the work. The appellant also felt that it was defamed because the letter that was written by the respondent was copied to the CLIENT, (NSCD) and that affected the appellant in terms of work performance and credibility. The appellant's former customers like TANESCO, CELTEL, TTCL and NSCU lost interest to work with her because they doubted the appellant's credulity and competence. The appellant was aggrieved. She filed a suit against the respondent asking for a declaration that the circumstances for the refusal by the respondent to install the bulky meters was unreasonable and unjustified and the respondent should be compelled to install the meters.

They also asked for specific damages of T. shillings 59,000,000/=, punitive and general damages, as well as costs.

The suit by the appellant was filed in the Commercial Division of the High Court of Tanzania. The issues that were framed for the determination for the trial court were:

1. Whether the defendant occasioned/caused the delay in respect of the power supply for the 25 Blocks of 8 apartments each at Kijitonyama.

2. If the answer to issue No.1 is in the affirmative, whether there was any justification for the said delay.

3. Whether the materials used for the construction of the High Tension Line (HT) and Low Tension Line (LT) were lawfully acquired by the Plaintiff.

4. Whether the Plaintiff's image was tarnished in view of the Defendant's letter dated August 28th 2006.

The High Court, (Mjasiri, J.) dismissed the suit with costs. She held that the plaintiff failed to prove its case on the standard required. The

appellant failed to comply with section 110(1) and (2) of the Law of Evidence Act, [CAP 6 R.E.2002]). In answering the first issue the learned trial judge said there was evidence that was produced by the respondent showing that the respondent's materials were found to have been used by the appellant in the construction of the power lines. The materials are listed in exhibit D6. They include wooden pole 12 m, porcelain disc insulators, 11 KV pin insulators polymeric, 11 insulator-porcelain, lighting arrestors, 16 mm 2 N/S Concentric cable, wooden pole 9 m, 100mm2 AAC PVC LT LINE A, 100 mm2 AAC PVC LT LINE Band 315 KVA 11 KV/O.4 KV . The learned judge went on to say that the respondent was not a party to the contract between the appellant and the National Service Construction Department. Although the completion of the project was delayed, the learned trial judge said, the blame for the delay could not be shifted to the respondent because it was the appellant who failed to account for the respondent's materials that were found to have been used for the construction of the power station. She referred to exhibit P.2 which created the relationship between the appellant and the respondent and said it was vague and too general and lacked specificity. That being the position, the learned judge observed, although according to the contract between the appellant and the NSCD (exhibit P1)

the handing over of the project was delayed, the respondent could not be blamed for the delay. She answered the first issue in the affirmative but said the respondent could not be blamed for the delay because of the reasons she gave.

Regarding the issue of whether the materials used for the construction of the high and low tension lines for supply of electricity to the 8 blocks at Kijitonyama were lawfully acquired, the learned trial judges's finding was that the appellant did not come out with clear evidence on where the materials were obtained. She said each party had a duty and responsibility to come up with evidence on the issue. In that respect the trial court failed to conclude that the materials were lawfully acquired.

As regards the issue of whether the appellant was entitled to damages, the learned trial judge's findings was that the agreement between the appellant and the respondent was too general, vague and lacked specificity and the was no proof that the appellant's reputation was lowered so as to entitle her to payment of compensation. She added that the words were not defamatory because they depicted the true picture of what was found at the cite during the inspection. Citing the case of **Waters V Sunday Pictorial News Papers** (1961) 1 W.L.R. 967 the learned trial judge said no particulars

of defamation was given. She answered the issue in the negative that the appellant was not entitled to damages because no defamation was proved.

Aggrieved by the decision of the High Court, the appellant has four grounds of appeal as reproduced hereunder:

1. That the trial judge erred in law and fact for failure to hold that the Respondent occasioned/caused delay in respect of the power supply for the 25 blocks of 8 apartments each at Kijitonyama and that such delay had no any justification whatsoever.
2. That the trial judge erred in law and fact for failure to hold that the materials used for the construction of the High Tension Line (HT) and Low Tension Line (LT) for 25 blocks of eight apartments each at Kijitonyama were lawfully acquired by the appellant.
3. That the trial judge erred in law and fact for failure to hold that the appellant was entitled to specific and general damages in the circumstances of the case.
4. That the trial judge erred in law and fact for failure to hold that the Respondents letter dated 28th August, 2006 addressed to the National Service Construction Department (NSCD) amounted to

publication and defamation and the appellant's reputation was tarnished by that publication.

When the appeal came for hearing, Mr. Daniel Ngudungi, learned counsel appeared for the appellant. The respondent was represented by Mr. Gasper Mnyika and Mr. Howa Msefya, learned counsel. Submitting in support of the appeal, the learned counsel said in respect of the first ground of appeal that the appellant did complete the work it was sub contracted to do in time, and so the respondent was not justified to refuse to install the meters. Reasons that were given by the appellant's counsel were that the project was supervised by the respondent's officials. That was done from the time the work started. The respondent itself adjudged its officials who supervised the work to be untrustworthy. In as far as the appellant was concerned, the measure taken by the respondent in respect of its officials was not its responsibility and had no role to play in whatever the respondent considered to be untrustworthy on its staff. His considered opinion is that the condition that was imposed by the respondent of requiring clarification on the source of where the materials were obtained was an afterthought because according to exhibit P8 the materials were inspected before the appellant started the work. The learned counsel said some of the materials

were obtained from the respondent and others from another supplier. He prayed that the first ground of appeal be allowed.

As he responded to the first ground of appeal, Mr. Mnyika submitted that the relationship between the appellant and the respondent is based on exhibit P2. The respondent was not a party to the subcontract entered into between the appellant and the main contractor. Even the subcontract does not indicate the time frame for the completion of the work. He said in as far as the position of the appellant and the respondent is concerned, there was no agreement that entitled the appellant to sue the respondent. The learned advocate said the appellant could have succeeded if the claim was substantiated. He said the finding of the learned trial judge was that exhibit P2 was vague and lacked details. Regarding the queries raised by the respondent as reflected on exhibit P.6, the learned counsel said there is nothing to fault the learned trial judge on the evaluation of the evidence because the appellant did not reply to exhibit P6. The learned advocate said the evidence on record shows that the appellant requested the respondent to supply the meters on 23rd August 2006. On 28th August 2006 the respondent replied to the request by asking the appellant to indicate where it obtained the materials used for the construction of the High and

Low Tension Lines. Instead of the respondent disclosing where it obtained the materials, the appellant rushed to Court and filed the suit on 31st August, 2006 claiming for damages. He concluded in respect of the first ground of appeal that the first ground of appeal has no merit and it should be dismissed.

This is a first appeal. The principle of law established by the Court is that the appellant is entitled to have the evidence re-evaluated by the first appellant court and give its own findings. See the case of **Pandya V R** (1957) E.A. cited with approval in the case of **Maramo Slaa Hofu and others V R** Criminal Appeal No. 46 of 2011 (unreported) and also that of **Deemay Daati and two others V R** Criminal Appeal No. 80 of 1994 (unreported). The cases cited are criminal in nature but the principle enunciated applies to both civil and criminal cases. After re- evaluation of the evidence that was led by the parties in the trial court, we agree with the learned counsel for the respondent that the first ground of appeal lacks merit.

As correctly held by the learned trial judge the respondent was not a party to the contract that was made between the appellant and the National Service Construction Department (NSCD) exhibit P1. In terms of Exhibit P1,

Future Century Limited is among the contractors whom the NSCD subcontracted. The respondent came in by virtue of the objective for which it was established namely to supply electricity to the whole nation. Exhibit P2 is a letter that was written to the appellant by the respondent on 30th August 2005. The introductory party of exhibit P2 is concerned with the project of the construction of the HT overhead line and two Transformers at 25 blocks Kijitonyama project. It says:

> *"The following are our terms of revised quotation for the above project now that you* ***will supply the materials and the construction works yourself.***
>
> 1. *Payment of T.shs. 960,000.00 VAT inclusive being supervision fee for HT line and substation works.*
> 2. *Quotation for meter deposit and service lines will be issued after the line and substation works are completed.*
> 3. *Payment of T.shs. 600,000.00 VAT inclusive being commissioning fees for HT line and transformer substations.*

4. *Be informed that we shall need to inspect the materials before the commencement of the works.*

On receipt of payments as shown above and upon obtaining satisfactory material inspection results, we shall start the work prescribed above. All electrical equipments/material up to and including the meter shall remain the property of TANESCO"

On 27th August, 2006 the appellant requested the respondent to install the meters but the respondent raised a query to the following effect:

"*Before we give you quotation for service line & meter connection and supply power to the project namely 25 Blocks Kijitonyama, we would like your office to clarify to us of how you obtained the materials used for the construction of HT line, Distribution transformers /substation and LT line at the premises referred as almost all materials appear to be of TANESCO".*

There is no evidence on record to show how the respondent responded to the query. Instead the appellant went to court and filed the suit against

the respondent. The learned judge observed correctly in our view that the arrangement reached between the Plaintiff and the Defendant was too general and lacked specificity on the materials to be used, the time frame for the completion of the work and the supervision that had to be carried out by the Defendant. This means that in adducing evidence to support the claim, the respondent had to establish that he had a cause of action against the respondent justifying the prayers it was asking the Court to grant. If she was not privy to the contract entered into between NSCD and the appellant, definitely he had no cause of action against the respondent and so there is no reason for faulting the decision of the trial judge on her finding. The first ground of appeal therefore has no merit.

The second ground of appeal relates to the third issue that was framed by the trial court. That was the issue of damages claimed by the appellant because the respondent did not install the requested meters at the time it was requested to do so. In support of this ground of appeal the learned advocate for the appellant submitted that exhibit P8 were lawful receipts tendered in court to show where the materials were bought. He said even the defendant' witness, Mr. Nsajigwa Mwaisaka (DW1) admitted in writing a letter to authorize the appellant to purchase materials with the respondent's

marks from AUTO-MECH. The learned counsel denied the allegation by the respondent that the materials used belonged to her. He prayed that this ground of appeal be allowed.

On his part, the learned counsel for the respondent said that the appellant had no basis for complaint because the materials used had marks showing that they belonged to TANESCO. The learned advocate admitted that some of the receipts in exhibit P8 were issued by the respondent but he said they were issued in respect of work that was done by the appellant at Dodoma.

Our considered opinion is that for this ground there is no need for us to fault the learned trial judge's finding. As she observed, the appellant had the duty and responsibility to adduce evidence sufficient to prove the lawful purchase of the materials used for the construction of the project. Section 110(1) and (2) says:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist."*

"When a person is bound to prove existence of any fact, it is said that the burden of proof lies on that person."

It was the responsibility of the appellant to bring witnesses from the suppliers from whom it purchased the materials. The appellant however did not call any witness. Not even the witnesses the respondent was alleged to have dismissed for mishandling the project. Under the circumstances we see no reason for interfering with the learned trial judge's finding. It is clear from exhibit P2 that the appellant was to supply the materials for the construction herself. It had the responsibility to produce evidence to prove lawful purchase of the materials used in the construction work and to prove that it was not the materials of the respondent. Since that was not done, the second ground of appeal fails.

The brief submission by the learned advocate for the appellant in respect of the third ground of appeal is that because the appellant failed to install the meters, the appellant's contract was terminated and the final payment of T.shillings 59,000,000/= was not paid. The response by the learned advocate for the respondent was that the appellant could not be paid damages because no breach was proved.

On our part we need not waste our time on this matter. As already held in respect of the first and second grounds of appeal, the appellant was not privy to the contract that was entered into between the appellant and the NSCD. As the appellant has failed to prove that the respondent breached any agreement, it would be ridiculous for the learned trial judge to order payment of damages to the appellant. Specific damages must be pleaded and proved. Although the appellant pleaded to have suffered loss and prayed for special damages of T shillings 59,000,000/= it led no evidence to substantiate the claim. The Court held in its decisions in the cases of **Zuberi Augustino V Anicet Mugabe** [1992] T.L.R. 137 and **Cooper Motors Corporation (T) Ltd V Arusha International Conference Centre** [1991] T.L.R. 165 that special damages must be specifically pleaded and proved. Evidence was produced by the appellant to show that it had entered into a contract with the NSCD (exhibit P.1) and that the contract price was Shillings 119, 789, 230/=. There were three contractors. These were the Dustan Electrical Engineering Service Limited, Namis Corporate and Future Century Limited. The contract is silent on the amount payable to each contractor. Although the appellant produced a letter (exhibit P7) in court showing the client, NSCD, terminated the contract because the project was

delayed, there was no witness called to explain on what amount the appellant was entitled to in the contract and how the balance of the amount of T. shillings 59,000,000/= remained unpaid so as to entitle the appellant ask for special damages. Given the shortfalls in adducing evidence to support the issue, ground three of the appeal therefore lacks merit.

The last ground of appeal was on the issue of defamation. The complaint by the appellant was that the letter written by the respondent requiring disclosure of where the materials for the construction of the high and low tension lines were obtained was defamatory because it was copied to the client.

Submitting in support of this ground, the counsel for the appellant said the respondent by copying the letter to the NSCD did defame the appellant and so the appellant is entitled to damages. The response by the learned advocate for the respondent was that the appellant was not able to prove that the letter (exhibit P6) was defamatory so as to entitle the appellant to be compensated by damages. On this ground there is no reason for the Court to interfere with the finding of the learned trial judge because it was the NSCD which contracted the appellant to construct the high and low tension lines. The letter was not copied to an outsider and so the appellant has no

basis for claiming that the letter was defamatory. All the grounds of appeal have no merit. The appeal is eventually dismissed with costs.

DATED at DARES SALAAM this 04th day of February, 2016.

N.P. KIMARO,
JUSTICE OF APPEAL

K. K. ORIYO,
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

I certify that this is a true copy of the original

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL