IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KWARIKO, J.A, SEHEL, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 184 OF 2020

SUBA AGRO-TRADING AND ENGINEERING COMPANY LTD..... 1ST APPELLANT

SARAH MUYA.....2ND APPELLANT

VERSUS

SEEDCO TANZANIA LIMITED.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Commercial Division at Arusha)

(Khamis, J.)

dated 2nd day of August, 2019

in

Commercial Case No. 19 of 2013

JUDGMENT OF THE COURT

14th & 22nd August, 2023

SEHEL, J.A.:

This first appeal stems from the decision of the High Court of Tanzania, Commercial Division (the High Court) in Commercial Case No. 19 of 2013 (the suit). In that decision, the High Court awarded the respondent TZS. 1,049,448,466.46 plus interest on the decretal sum at the court's rate of 7% per annum from the date of judgment till full satisfaction. It also awarded the counter claimant, the 1st appellant, TZS. 175,947,938.65 plus interest on the decretal sum at the court's rate of

7% per annum from the date of judgment till full satisfaction. Aggrieved by that decision, the appellants filed the present appeal.

The controversy between the parties arose out of a Sales Agency Agreement dated 27th September, 2011 which was, later on, superseded by the Super Dealer Agreement dated 28th August, 2012. As per the terms and conditions of the agreements, the respondent agreed to supply to the 1st appellant agricultural inputs, seeds and their derivatives (the products) for the 1st appellant to redistribute them to the wholesalers and retailers which the 1st appellant undertook to do in a timely and orderly manner.

In its plaint, the respondent alleged that, in consideration of the 1st appellant's undertaking to promote and redistribute the products, the respondent granted to the 1st appellant a credit purchase limit of TZS. 600,000,000.00 which was secured by a personal guarantee of the 2nd appellant, in favour of the respondent, binding herself, as a surety and co-principal debtor for the due and punctual payment of the entire credit purchase amount. Further, the 1st appellant issued postdated cheques in favour of the respondent to cover the value of the products supplied by the respondent to the 1st appellant.

The respondent further alleged that it heeded to the terms of the agreements by supplying the products to the 1st appellant and the latter utilized the credit facilities but the 1st appellant failed to make due and timely payment for the products supplied as agreed. As at 22nd May, 2013, the amount that remained outstanding on the 1st appellant's account for the 2011 agreement was TZS. 627,340,306.05 and for the 2012 agreement was TZS. 598,056,099.06. It was further claimed that out of the total outstanding amount, the 1st appellant was entitled to deduct TZS. 175,947,938.65 being rental charges of the leased warehouse belonging to the 1st appellant. Therefore, the respondent sued the appellants claiming, among other things, for payment of TZS. 1,049,448,466.46 being net amount outstanding and remained unpaid in respect of the credit amount advanced and the products supplied to the 1st appellant.

In their joint written statement of defence, the appellants disputed the respondent's claims asserting that the appellants discharged the entire amount on diverse dates and counter claimed against the respondent TZS. 195,884,425.00 being outstanding rental fees for the warehouse leased by the respondent and TZS. 2,469,797,185.65 being an amount erroneously overpaid to the respondent. In addition, the appellants raised a preliminary objection that the suit was filed without

the sanction of the respondent's board resolution which was ordered to be considered during the trial.

After the completion of the preliminary stages, the following issues were put on trial:

> *"1. On the basis of the Agent Sales Agreement of 27 September, 2011 and 28th August, 2012 whether the respondent had any outstanding claims to the sum of TZS. 1,049,448,466.46 against the defendants.*
>
> *2. Whether the 1st appellant had made overpayment of TZS. 2,469,797,185.65.*
>
> *3. Whether there was accrued rentals for the godown in the sum of TZS. 195,844,425.00, and if yes, whether the 1st appellant is entitled to payment of the accrued rentals.*
>
> *4. To what reliefs are parties entitled."*

Before dwelling on the issues, we wish to point out that, the prevailing rules, by then, required parties to file their witness statements within seven days of the completion of mediation and serve them to the other parties as may be directed by the Court. This was so provided under rule 49 of the High Court (Commercial Division) Procedure Rules, 2012 published in the Government Notice number 250 of 2012 (the Commercial Division Rules). The record of appeal shows that the respondent filed a total of six witnesses' statements but called only four

witnesses for cross examination, namely; Felix Boniface Silayo (PW1), Sakwai Mbanda (PW2), Julius Muhunde Rwajekare (PW3) and Engelbert Mudzimba (PW4).

On the part of the appellants, they filed three witnesses' statements of Nicholaus Fredrick Duhia (DW1), Mahenye Chacha Muya (DW2) and Sarah Muya.

The record further shows that, the defence case started on 23rd March, 2017 where DW1 testified on that date and then the matter was adjourned to 28th April, 2017. On the adjourned date, DW2 took the witness box and in the course of hearing, the learned counsel for the respondent objected to the tendering of delivery notes for the transactions done between 28th September, 2011 and 26th August, 2012 attached to the witness statement as annextures 4, 5 and 7. The objection was to the effect that the tendering of the annexures contravened the provisions of Order XIII rules 1 and 2 of the Civil Procedure Code, Cap. 33 (the CPC) as they were not produced before or at the first hearing of the suit. Neither did the appellant give any good reason that would have enabled the High Court to admit in evidence the documents at the subsequent stage of proceedings. After hearing the counsel for the parties on the objection raised, the High Court sustained it. Accordingly, it declined to admit annexures 4, 5 and 7 in evidence.

Immediately after the High Court had delivered its ruling, the learned counsel for the appellants prayed that the hearing of the case be adjourned for him to consult his clients. The High Court granted the prayer and hearing was adjourned to 22nd May, 2017. Thereafter, ensued several adjournments due to the non-attendance of either DW2 or his advocate, one Mr. Boniface Joseph.

It is on record that on 26th July, 2917, when the matter was called again for continuation of the defence case, the High Court was informed that the appellants had lodged Civil Application No. 566/16 of 2017 to the Court seeking revision of the High Court's proceedings. In that respect, the High Court stayed its proceedings pending the hearing and final determination of the application for revision.

The application for revision was finally struck out on account that it was preferred against an interlocutory order which is barred by section 5 (2) of the Appellate Jurisdiction Act, Cap. 141. That striking out order paved way for the continuation of the trial of the case.

Therefore, on 12th February, 2019, the case was placed for continuation of hearing the defence case. Before the case proceeded for trial, the learned counsel for the respondent prayed for an extension of

the life span of the case which was granted and extended for a period of six (6) months to be reckoned from 12th February, 2019.

Thereafter, the learned counsel for the appellants, Mr. Boniface, was invited to continue with the defence case. Instead of calling his witness, he prayed for an adjournment advancing an excuse that the first summons issued to them dated 18th January, 2019 was for mention but on Friday of the 1st day of February, 2019, they received another summons for hearing dated 30th January, 2019. Upon receipt of the latter summons, he tried to get in touch with his witness, Mr. Muya (DW2) whose evidence had been partly received by the High Court, but his mobile phone was unreachable. He added that they even visited his office in Arusha only to be told that the witness was in Mbozi, Mbeya for farming activities and selling of agricultural inputs. The office also failed to get him through his mobile phone. With that eventuality, the learned counsel for the appellants urged the High Court to adjourn hearing of the case till the end of February, 2019 as by that time, the witness would have been back to Arusha from Mbozi. The prayer was strongly opposed by the learned counsel for the respondent, arguing that there was no sufficient reason advanced by the counsel for the appellants and that, all along they had been delaying hearing of the case. He recounted the instances of 13th June, 2017, 28th June, 2017 and 28th

June, 2017 where the witness, DW2 was reported sick and the act of the appellant of filing an application for revision on interlocutory proceedings.

Having heard the rival submissions, the High Court concurred with the submissions of the learned counsel for the respondent that, on several occasions, the hearing of the defence case was adjourned at the instance of the appellants. It observed that, DW2 gave his evidence on 28th April, 2017 but did not complete giving his evidence. When the case was called on 22nd May, 2017 for continuation of the DW2's testimony, it was adjourned on ground that the learned counsel for the appellants was reported sick. Yet again on 25th May, 2017, when it was called for continuation of hearing, it was adjourned as the learned counsel was still sick. Even, on 13th June, 2017 and 28th June, 2017, the hearing could not proceed and at this time it was the witness, DW2 who was reported sick and on 27th July, 2017 the hearing was stayed because the appellants resorted into filing revision before the Court.

After being satisfied that the appellants were duly served with the summons dated 30th January, 2019 through their learned counsel, the High Court observed that the counsel for the appellants had ample time, of two weeks, to prepare and organize himself for hearing but failed to do so. Therefore, it was not satisfied with the reason given by the

counsel for the appellants as it found that the act of DW2 to continue with his farming activities despite being dully notified through its Arusha offices was disobedience of the court process. Accordingly, it closed the defence case and proceeded to determine the case based on the evidence produced before it. Both parties partly succeeded in their claims as indicated earlier on.

Undaunted, the appellants have come to this Court seeking to challenge the decision of the High Court advancing thirteen grounds of appeal.

At the hearing of the appeal, Messrs. Michael Lugaiya and Robert Roghat, learned advocates appeared for the appellants, whereas, the respondent had the legal services of Messrs. Deusdedith Mayomba Duncan and Edward Nelson Mwakingwe, both learned advocates.

After adopting the written submissions filed on 16th April, 2020 in support of the memorandum of appeal, Mr. Lugaiya abandoned the 1st, 10th, 11th and part of the 13th grounds of appeal and started with the 2nd and 3rd grounds of appeal.

In respect of the 2nd and 3rd grounds of appeal, Mr. Lugaiya contended that the learned trial Judge wrongly exercise his discretion by closing the defence case following the failure to procure the witness on

a date fixed for hearing thus denying the appellants a right to be heard and the 2nd appellant's right to mount her defence and final submissions. He further contended that the High Court abrogated the appellants' right to be heard. He pointed out that the record of appeal shows that DW2 partly testified on 28th April, 2017 and on 12th February, 2019 when the case was called upon for DW2 to continue with his evidence, DW2 was not present in court for the reasons explained to it. Despite the reasons stated, it declined to grant a prayer for adjournment and it went ahead to close the defence case without giving an opportunity to the 2nd appellant to defend herself despite the fact that her witness statement was filed and served upon the respondent.

To fortify his argument that the 2nd appellant ought to have been given a chance to testify, Mr. Lugaiya referred us to page 907 of the record of appeal and argued that, after DW1 had testified, the High Court was informed by the learned counsel for the defendant that he had two more witnesses to testify; and to pages 860 and 3732 of the record of appeal where the High Court acknowledged that the appellants filed three witnesses' statements, including that of Sara Muya, the 2nd appellant.

He added that the High Court further denied the 2nd appellant a right to be heard as she was not given a chance to file her final

submissions as it ordered only two parties to file their final submissions. He also contended that the High Court contravened the provisions of Order XVIII rule 1 of the CPC by ordering the parties to file their final submissions on the same day whereas the law requires the plaintiff to start and the defendant to follow in reply.

Relying on the authorities of this Court on the right to be heard as a basic right and also a fundamental right guaranteed in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) as held in the cases of **Hussein Khan Bhai v. Kodi Ralph Siara**, Civil Revision No. 25 of 2014 [2016] TZCA 35 (24 October, 2016; TANZLII) and **Yazidi Kassim Mbakileki v. CRDB (1996) Ltd & Another**, Civil Reference No. 14/04 of 2018 [2019] TZCA 117 (16 May, 2019; TANZLII), Mr. Lugaiya implored the Court to allow the appeal by nullifying the proceedings of 12th February, 2019, quashing the judgment and setting aside the orders made therein.

The respondent strongly opposed Mr. Lugaiya's contention by arguing that the 2nd appellant's right was not abrogated because the appellants joined forces to defend the respondent's case and nowhere in the record is suggested that each appellant had its own case to defend. To bolster his argument that the case for the appellants was one, Mr. Duncan referred us to various pages of the record of appeal. He pointed

out particularly at pages 58-59 where the appellants jointly sought and obtained leave to defend; at pages 277 – 289 where there is a joint written statement of defence; at page 288 where the 2nd appellant verified the joint written statement of defence and at page 848 where during the scheduling conference, the appellants pleaded to parade a number of four witnesses.

Although, Mr. Duncan acknowledged the fact that DW2 partly testified and later failed to appear for continuation of his testimony, he was quick to assert that the appellants failed to advance sufficient reason to warrant the High Court to accept the prayer for adjournment of hearing of the defence case. With that submission, Mr. Duncan invited us to dismiss these two grounds of appeal.

After a careful consideration of the submissions of the learned counsel for the parties and the record of appeal we find that the 2nd and 3rd grounds of appeal call upon us to determine as to whether the High Court acted in breach of natural justice by declining to adjourn the hearing of the defence case due to the failure to ensure the attendance of the witness who was unreachable and by closing the appellants' case.

For a start, Order XVII rule 1 (1) of the CPC and rule 46 (2) (b) of the Commercial Division Rules as amended by the Government Notice

No. 107 of 2019 govern the adjournment of suits. Rule 46 (2) (b) of the Commercial Division Rules provides:

> *"No adjournment shall be granted at the request of a party or parties except where the circumstances are beyond the control of the party or parties, as the case may be."*

It is therefore evident from the above provision of the law that for a prayer for adjournment to succeed, there ought to be circumstances beyond the control of the party requesting for adjournment.

In the present appeal, it is without doubt, and as conceded by the respondent, the evidence of DW2 was partly received by the trial court on 28th April, 2017. Further, it is on record that after the application for revision was struck out by the Court, the case was called on 12th February, 2019 for continuation of the defence case where DW2 was expected to continue with his evidence. However, it was reported that the witness could not be traced hence a prayer for adjournment was made. It was the submission of Mr. Lugaiya that the High Court decided to close the appellants' case while there were reasons stated by the counsel for the appellants as to why the witness could not be procured to appear before the High Court for continuation of his evidence. In order to fully appreciate the complaints by the appellants, we wish to

reproduce part of the submission made before the High Court by Mr. Boniface, the learned counsel for the appellants:

> ***"Mr. Boniface, Advocate:***
>
> *My Lord, the matter is for defence hearing. It was a continuation of defence hearing of DW2 Mahenye Muya. It was partly heard. He is the last witness for the defence.*
> *Your Lordship, the said witness could not make it for appearance today for the following reasons:*
> *First, on 18/01/2019 we received summons that the matter will be called before the court for mention. We accordingly informed our clients that the matter was just for mention and that their appearance was unnecessary.*
> *Again, my lord, on 01/02/2019 we received a summon dated 30/01/2019 that the suit had been fixed for defence hearing. It was Friday but after 3 days we made some efforts to consult the witness, DW2 unsuccessfully as he was not reachable. We visited to his office here in Arusha just to be informed that he is in Mbozi Mbeya for farming and selling of agricultural inputs through his Mbeya branch."*

From the above, the High Court was informed that the summons dated 30th January, 2019 was received by the counsel on 1st February, 2019 which was on Friday and after 3 days, that is, on Monday, the

counsel started to look for his witness but was not reachable. It is also evident from the reproduced extract that the learned counsel took further steps in trying to secure the attendance of his witness by visiting the branch offices of DW2 in Arusha but only to be told that the witness was in Mbozi, Mbeya. As such, his efforts were barren of fruits.

The evidence on record shows that the summons was served upon the counsel for the appellants and not on the witness himself. Even if, for the sake of argument, we assume that the counsel was slopy in securing the attendance of his witness, we are increasingly of the view that the same should not be attributed on the litigants who come to court seeking substantive justice. To us, the fact that the witness was not found despite the efforts made by the counsel was sufficient reason to adjourn the hearing of the case to another date, particularly because the trial court had, on the same day made orders extending the life span of the case to another six months. By extending the life span of the case for six months more, we take it that the High Court anticipated the conclusion of the trial to be within that period of time. Therefore, we are satisfied that the denial to allow adjournment even by two or three days was a clear indication of abrogation of the rules of natural justice. In this jurisdiction, it is a well-established principle of natural justice that a party to a case must be given a fair hearing including the provision of

effective and adequate opportunity to defend his case unless provided otherwise by the law.

This right is also constitutionally guaranteed, as rightly submitted by Mr. Lugaiya, under Article 13 (6) (a) of the Constitution which stipulates that:

> *"To ensure equality before the law, the State Authority shall make procedures which are appropriate or which take into account the following principles; namely:*
>
> *(a) when the rights and duties of any person are being determined by the Court or any other agency* ***that person shall be entitled to a fair hearing*** *and the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned..."* [Emphasis is added]

In the case of **Mbeya - Rukwa Autoparts and Transport Ltd v. Jestina George Mwakyoma** [2003] T.L.R. 251, the Court re-affirmed that the right to be heard is both constitutional and fundamental one when it held that:

> *"In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13(6)(a)*

includes the right to be heard among the attributes of equality before the law..."

Much as we are aware that the appellants requested for a longer period of adjournment, but we believe the High Court could have given the appellants a shorter period within its discretion and condemn them to pay costs for adjournment, in terms of rule 46 (2) (a) of the Commercial Division Rules. Given the peculiar circumstances of this appeal, we are satisfied that failure by the High Court to afford appellants the final chance to bring their witness who they tried to secure but, due to the circumstances beyond their control, failed, was an obrogation of natural justice and that vitiated the entire ruling of 12th February, 2019 and the proceedings that followed, including the High Court's judgment. We therefore find merit in the 2nd and 3rd grounds of appeal.

Given that the 2nd and 3rd grounds of appeal dispose of the entire appeal, we see no need to continue discussing the remaining grounds of appeal.

Finally, we proceed to nullify the proceedings of the High Court that ensued from the proceedings of 12th February, 2019, quash the ruling dated 12th February, 2019 and set aside the judgment which emanated from the null proceedings. We further order that the case be

remitted to the High Court with directions to expeditiously proceed with the hearing and determination of Commercial Case No. 19 of 2013 according to law from where the partly heard evidence of DW2 ended. In the circumstances of this appeal, we make no order as to costs.

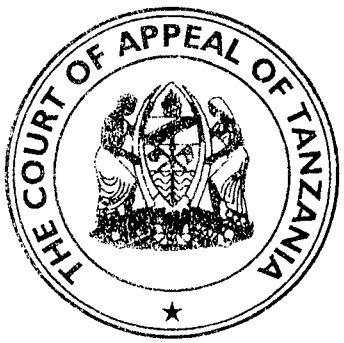
DATED at **ARUSHA** this 22nd day of August, 2023.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of August, 2023 in the presence of Mr. Michael Lugaiya, learned advocate for the appellants and Mr. Jeffe George Sospeter, holdings brief for Mr. Deusdedit Mayomba Duncan, learned advocate for the respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL