IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., KIHWELO, J.A. And MGONYA, J.A.)

CIVIL APPEAL NO. 60 OF 2021

PRECISION AIR SERVICES PLC .....APPELLANT

VERSUS

MASOKO AGENCIES (T) LIMITED.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Fikirini, J.)

dated the 17th day of September, 2020
in
Commercial Case No. 166 of 2017

.....

JUDGMENT OF THE COURT

9th February & 16th April,2024

KIHWELO, J.A.:

On 11th October, 2017 the appellant, Precision Air Services Plc, a public listed company running scheduled flights in Tanzania and beyond, instituted a suit against the respondent in the High Court of Tanzania (Commercial Division) at Dar es Salaam (the trial court), over unremitted air tickets sales proceeds. During the trial, it was not disputed that, the appellant and the respondent on 7th December, 2012 entered into a one-year Passenger Sales Agency Agreement ("the PSA"). Under the said contract, it was agreed that the respondent will sale air tickets and remit proceeds through the appellant's designated bank account.

The appellant's claim was that the respondent failed to remit air ticket sales proceeds as agreed despite receiving the payments from customers. It was the appellant's further contention that on 6th November, 2013 prior to the expiry of the agreement, parties sat for reconciliation of accounts which revealed that, the respondent was allegedly indebted to the tune of Tanzania Shillings Three Hundred Sixteen Million Three Hundred Eight Nine Thousand Five Hundred Forty-Nine (TZS 316, 389, 549.00) and United States Dollars Three Thousand Six Thirty-Four Hundred and Ninety Cents (3, 634. 90) as at 23rd October, 2013.

Sequel to the foregoing, the appellant claimed to have suffered specific damage in terms of loss of goodwill and credibility associated with delays and flight cancellation due to financial incapacity, loss of profits and business frustration owing to the behavior of the respondent, interest and costs of the suit.

From the very outset, the respondent denied the accusation that it owed the amount of money as stated by the appellant but did not quite deny the fact that it was contracted to sell air tickets and remit proceeds to the appellant through the appellant's designated bank account. However, the respondent denied the alleged reconciliation on the basis that the reconciliation and the subsequent acknowledgement was done

by an unauthorized person. Essentially, the respondent blamed the appellant for failing to accept the issue of verification of all sales, cancellation refunds from the system as well as costs on investment incurred by the respondent for promotion of the appellant's business.

It is noteworthy that, apart from the written statement of defence which the respondent lodged denying the accusations, it lodged a counter claim against the appellant for an amount of United States Dollars One Hundred Forty-One Thousand One Hundred and Twenty (USD 141, 120.00) arising from a Ground Handling Agreement said to have been executed between the appellant and the respondent. The respondent further alleged that, it requested the appellant to offset its outstanding claims for ground handling services with the outstanding claims for air tickets sales proceeds.

From the pleadings the trial court framed three issues for determination. **One**, whether there was breach of the PSA in the main suit, **two**, whether the appellant and the respondent in the counter-claim entered into Ground Handling Agreement and if yes, what were the terms and the extent of the breach; and **three**, to what reliefs were the parties entitled.

Having heard the contending evidence in support and opposition to the suit and the counter-claim, the learned trial Judge (Fikirini, J. as she then was) pronounced judgment on 17th September, 2020 and found out that, the appellant and respondent failed to prove their respective claims against each other. Consequently, she dismissed both the suit as well as the counter claim in their entirely with no order as to costs.

The appellant presently seeks to overturn the decision of the trial court through a memorandum which is comprised of seven points of grievance, namely:

1. *That the learned trial Judge erred in law and facts by basing her decision on the issue of reconciliation which was not one of the framed issues.*
2. *That the learned trial Judge erred in law and fact by raising the issue of reconciliation while the respondent had never disputed the sales reports exhibit P2.*
3. *That the learned trial Judge erred in law and facts by failing to properly assess the evidence and holding that there was no reconciliation on account that Iddi Nassoro was not an authorized person to conduct the reconciliation on behalf of the respondent.*
4. *That the learned trial Judge erred in law and fact by holding that the reconciliation done by Iddi Nassoro was not authorized since there was no notice issued under clause 3 of the Passenger Sales Agreement.*
5. *That the learned trial Judge erred in law and fact by basing her decision on the Computer Reservation System (CRS) while clause*

2.2 of the Passenger Sales Agreement clearly stipulated how the accounting/ reconciliation of the ticket sales proceed is done.

6. *That the learned trial Judge erred in law and fact by bringing extraneous issues/matters of cancellation, refused tickets and so forth while well knowing that this formed part of the Counter Claim that was dismissed for lack of proof.*
7. *That the learned trial Judge erred in law and fact by failing to award damages, interest and costs of the suit.*

It occurred that, on 30th January, 2024 the appellant lodged two additional grounds of appeal and when the appeal was ripe for hearing on 9th February, 2024 the counsel for the appellant sought and obtained leave in terms of rule 113 (1) of the Tanzania Court of Appeal Rules, 2009 ('the Rules') to argue two additional grounds. They are as follows:

> *(a) That the learned trial judge erred in law in striking out the witness statements of Iddi Said Nassoro, who was the key witness to the reconciliation, after failing to appear for cross-examination. The trial court should have accorded less weight to the statement and drew adverse inference against Iddi Said Nassoro.*
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> *(b) That the learned trial judge erred in law and fact by failing to consider whether the respondent had discharged its obligation under clause 2.2 of the contract by banking the money in the appellant's account on weekly basis.*

Before us, at the hearing, the appellant had the services of Mr. Roman S. L. Masumbuko, learned counsel whereas the respondent was represented by Ms. Elizabeth John Mlemeta, learned counsel. Both learned counsel lodged written submissions in support and in opposition to the appeal which they, respectively, fully adopted during the hearing. However, we hasten to remark that, it will not be possible to recite each and every fact comprised in the submissions but we can only allude to those which are directly relevant to the determination of the matter before us. In the upshot, Mr. Masumbuko invited us to allow the appeal with costs, whereas Ms. Mlemeta urged us to dismiss it with costs.

In the written submissions, Mr. Masumbuko started arguing the first ground of appeal by contending that, the learned trial Judge, having made clear finding that the respondent had not deposited ticket sales proceeds which was sufficient to rule that there was clear breach of the PSA (exhibit P1), she picked the issue of reconciliation as a determining factor, claiming that, there were claims of refunds and reconciliation that were raised. Elaborating, the learned counsel faulted the learned trial Judge for considering the claims of refunds, cancellation and other ground handling services which she had already dismissed in the counter-claim. Illustrating further, the learned counsel contended that, the learned trial Judge

shifted the burden of proof on the issue of outstanding amount by trying to dismiss the reconciliation reports made by the appellant and the respondent while at the same time not requiring any proof from the respondent on its account status. In his view, it was erroneous for the learned trial Judge to raise a new issue of notice of reconciliation and claim that there was no proper notice of reconciliation issued to the respondent for the area manager to attend and sign the reconciliation reports. The learned counsel referred us to the case of **Astepro Investment Co. Ltd v. Jawinga Company Ltd**, Civil Appeal No. 8 of 2015 (unreported) for the proposition that parties are bound by their own pleadings and the decision of the court has to come from what has been pleaded by the parties. He further, cited our earlier decision in **Pauline Samson Ndawavya v Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (unreported) in which we emphasized the cherished principle of law that, he who alleges a fact must prove and the standard of proof in civil case is on the balance of probabilities.

On the second ground of appeal, Mr. Masumbuko was fairly brief and argued that, the learned trial Judge erred for not giving any weight to the sales reports (exhibit P2) in her judgment while the sales reports were the epicenter of the dispute since the suit was based upon

unremitted sales proceeds. Elaborating, the learned counsel contended that, the respondent did not object the admissibility of sales reports (exhibit P2), reconciliation agreement and statement (exhibits P5 and P6) and that the only documents which were objected to by the respondents were emails and draft Deed of Settlement. In his view, if the learned trial Judge wanted to find if there was any reconciliation, she only had to look at the sales reports and the deposits made pursuant to clause 2.2 of the PSA.

Arguing the third ground of appeal, conjointly with the two additional grounds of appeal, Mr. Masumbuko faulted the learned trial Judge for not evaluating properly the evidence on record. In particular, the learned counsel referred to the reconciliation which was done by one Iddi Nassoro, the respondent's area manager for Mbeya in terms of Clause 2.2 of the PSA (exhibit P1). He argued further that, Iddi Nassoro was a key witness for the respondent's case since he worked as area manager in Mbeya where the sales took place, he filed the Witness Statement and also verified the sales reports and signed the reconciliation report. In his view, Iddi Nassoro ought to have been brought to testify for the respondent, but the respondent elected not to produce him as a witness despite the fact that his witness statement was filed in court but later

expunged in terms of rule 56 of the High Court (Commercial Division) Procedure Rules, 2012 ('Rules of the Commercial Court'). He contended further that, the learned trial Judge ought to have drawn an adverse inference against the respondent for the failure to substantiate the reconciliation. He made reference to the case of **Augustine Ayishashe v. Sabiha Omar Juma**, Civil Appeal No. 353 of 2019 (unreported) in which we discussed the failure of a party to produce or summon material witness and quoted with approval a passage from a book titled **Law of Evidence**, 17th Edition Vol. III by Sir John Wood-roffe and Syed Amir Alis and emphasized that, where a party fails to call as his witness the principal person involved in the transaction and who can refute all allegations of the other side, it is legitimate to draw an adverse inference against that party. He further referred us to the case of **Raphael Mhando v. Republic**, Criminal Appeal No. 54 of 2017 (unreported) for the proposition that, where a witness who is in the better position to explain some missing links in the party's case is not called without any sufficient reason being shown by the party, an adverse inference should be drawn against that party. He rounded off his submission in the three grounds by contending that it was erroneous and misleading for the learned trial Judge failure to analyze the evidence, the more so, when the respondent did not produce a report of the income received.

Arguing in support of the fourth ground of appeal, the learned counsel contended that, it was not correct for the learned trial Judge to find that Iddi Nassoro was not authorized to attend the reconciliation meeting and sign the reconciliation report on behalf of the respondent in terms of Clause 3 of the PSA. According to him, there is nothing in Clause 3 that requires reconciliation of the account to be done through a formal notice. He further argued that, the issue of reconciliation is governed by Clause 2.2 of the PSA which does not require a contact person. The learned counsel went on to submit that, since the respondent through Yohana Tweve (DW1) admitted that Iddi Nassoro, the area manager at Mbeya was the contact person for sales in Mbeya, it was then estopped from denying his authority to sign the reconciliation report. To facilitate the proposition of his argument, he cited to us the provisions of section 123 of the Evidence Act, Cap 6 ('the Evidence Act') and the case of **Trade Union of Tanzania (TUCTA) v. Engineering Systems Consultant & Others**, Civil Appeal No. 51 of 2016 (unreported). In this case we made it clear that, where one party has by his words or conduct made a clear and unequivocal promise which is intended to create legal relationship and is acted by that other party, the promise is binding and the party making the promise is estopped from denying the truth of it. He therefore,

insistently argued that, the Court should not turn a blind eye on this legal obligation which the respondent seeks to escape.

In relation to the fifth ground of appeal, the learned counsel faulted the learned trial Judge for introducing an issue of Computer Reservation System (CRS) as a basis for dismissing the appellant's claims. In his view, the CRS was not a sales report rather, a mere computer system for ticket reservation purposes which may include both sold and cancelled tickets, while a sales report contains information of tickets sold and the proceeds obtained. He referred us to pages 838 and 841 of the record of appeal to support his line of argument. He went further to submit that, surprisingly, the learned trial Judge found that since the CRS was shut off it made it impossible for the respondent to conduct reconciliation of tickets sold against the remitted proceeds, cancellation, refunds and unremitted sales tickets.

The learned counsel further contended that, the CRS had nothing to do with reconciliation as the respondent had already generated and issued sales reports (exhibit P2) after the reservation time had lapsed. Illustrating further, the learned counsel submitted that, the CRS was shut off to stop the respondent from making further sales of tickets as it failed to remit proceeds for the sold tickets which was the basis of the dispute

before the trial court. He reiterated the earlier submission that reconciliation was done pursuant to Clause 2.2 of the PSA.

The appellant's complaint in the sixth ground of appeal, faults the learned trial Judge for introducing extraneous matters of cancellation and refunds of tickets knowingly that these were part and parcel of the counter claim which was dismissed. Arguing in support of this ground, the learned counsel contended that, the learned trial Judge was swayed into finding that there was no reconciliation as issues of refunds, cancelled tickets and liberty tickets which were not at issue. Referring us to pages 41, 39, 811, 812, 840, 844, 870 to 1104 of the record of appeal, the learned counsel submitted that, the respondent was unable to prove through the counter claim that there were issues of refunds and cancellation and that is why the learned trial Judge rightly dismissed the counter claim and therefore, it was erroneous to consider extraneous matters of cancellation and refunds as the basis of dismissing the reconciliation.

Finally, the seventh ground of appeal, is against the learned trial Judge's failure to award damages, interest and costs of the suit having dismissed the counter claim for lack of proof. Elaborating, the learned counsel submitted that, the appellant was entitled to other reliefs prayed in the plaint following the dismissal of the counter claim bearing in mind

that there was no issue with reconciliation as parties ascertained the amounts not deposited and signed the reconciliation. He further argued that, the trial court found out that, there was no cancellation, refunds or other services claimed by the respondent which led to the dismissal of the counter claim. Thus, in his view, the learned trial Judge erroneously denied the appellant's rightful entitlements to the sales proceeds and therefore unfairly enriching the respondent. Reliance was placed on the case of **Trade Union of Tanzania (TUCTA)** (supra), **Hotel Travertine Limited v. M/s Gailey & Roberts Limited**, Civil Appeal No. 113 of 2008, **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 and **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited**, Civil Appeal No. 103 of 2003 (all unreported) for the proposition that where there is a right there is a remedy and insistently submitted that the learned trial Judge was wrong not to award costs of the suit as prayed and implored on us to set aside the judgment of the trial court by awarding costs of the suit to the appellant.

Conversely, in reply, the respondent's counsel prefaced her written submissions with an abridged background of the appeal which, for obvious and practical reasons, we will not recite. Submitting in response to the

first ground of appeal Ms. Miemeta contended that, reconciliation report was not a new thing as it featured prominently in the pleadings. Elaborating, Ms. Mlemeta submitted that, the respondent raised in the written statement of defence, the fact that, the reconciliation meeting and the ultimate agreement was done by someone who was not authorized by the respondent. She referred to us paragraph 4 of the written statement of defence at page 38 of the record of appeal as well as witness statement of Yohana Mtweve (DW1) at page 2202 of the record of appeal indicating that the reconciliation was not done by an authorized officer. She further submitted that, the allegations that the learned trial Judge employed double standard in the determination of the suit by shifting the burden of proof, are unjustifiably wrong and misleading.

The learned counsel, in further response to this ground argued that, it was upon the appellant to prove that reconciliation was done as alleged at paragraph 5 of the plaint and that it was done in compliance with the PSA. In her view, the learned trial Judge was justified in resolving the issue of reconciliation which was conspicuous on record citing paragraph 5 of the plaint at pages 2 and 3 as well as paragraphs 4, 5 and 7 of the written statement of defence at pages 38 and 39 of the record of appeal and considering that parties addressed the court on the issue of

reconciliation. To support her proposition, she cited to us the case of **Nkalubo v. Kibirige** [1973] E.A. 102, **Odd Jobs v. Mubia** [1970] 1 EA 476 and **Norman v. Overseas Motor Transport (Tanganyika Limited)** [1959] EA 131 in which the defunct Court of Appeal for East Africa discussed the powers of the court to decide on unframed but pleaded issues. Thus, the learned counsel contended that, it was appropriate for the learned trial Judge to have determined the issue of reconciliation which, though not framed as an issue parties had an opportunity to give evidence on it. She finally contended that, the appellant did not discharge the burden of proof since what was presented in exhibit P3 were mere imaginary figures and that, the cases cited by appellant were distinguishable. The learned counsel referred to us pages 184, 870 to 1104 to firm up her argument.

On the second ground, Ms. Mlemeta was very brief and reiterated her earlier submission in reply to the first ground of appeal. Moreover, she countered that the learned trial Judge was right in finding that the appellant was unable to prove the issue of reconciliation regardless of the respondent's non-objection to the admissibility of sales reports (exhibit P2), reconciliation agreement and statement (exhibits P5 and P6). Illustrating further, the learned counsel contended that, the fact that the

respondent did not object the admissibility of exhibits P2, P5 and P6 did not mean admission of its contents, rather, it is because the documents met the admissibility criteria. Otherwise, the respondent strongly refuted the claims by the appellant throughout, citing the reply to demand note at page 36 of the record of appeal, the written statement of defence at pages 38 to 40 of the record of appeal, the witness statement of DW1 at page 2202 of the record of appeal. In further response to this ground, the learned counsel submitted that, the respondent proved that exhibits P2 and P3 were insufficient and inadequate to establish the respondent's indebtedness to the appellant hence reconciliation was inevitable, and this was admitted by the appellant citing the evidence of DW1 during cross examination at pages 816 and 817 of the record of appeal as well as cross examination of PW2 at pages 780 and 782 of the record of appeal.

Addressing the third ground of appeal specifically, it was Ms. Mlemeta's submission that the learned trial Judge properly assessed the evidence on record and rightly came up with the conclusion that there was no reconciliation since, Iddi Nassoro was not authorized to do the reconciliation even without notifying the Managing Director of the respondent. In responding further to the third ground, the appellant counsel submitted that, the record indicates that it was the appellant's

counsel who prayed for the remaining witness statements to be struck out of the record a prayer which was granted by the trial court in terms of rule 56 (2) of the Rules of the Commercial Court and therefore, the appellant counsel is estopped from blaming the learned trial Judge for something which the counsel himself prayed. She further submitted that the trial court could not have drawn an adverse inference in such circumstances and the evidence of DW1 was credible and sufficient to make a case for the respondent.

In response to the fourth ground of appeal, Ms. Mlemeta contended that, the appellant is faulting the learned trial Judge for holding that no notice of reconciliation was issued and reconciliation was not done by authorized person. The learned counsel argued that, the learned trial Judge correctly held so since the PSA clearly and expressly provided names of contact persons and their respective addresses for notice purposes in the event of any communication. She argued that, as DW1 rightly testified, before the reconciliation there was no any prior notice given and that Iddi Nassoro could not enter any agreement on behalf of the respondent without there being a formal notice and authorization by the respondent. The learned counsel further reiterated that, the respondent being a limited liability company, the alleged reconciliation

agreement ought to have been executed in the presence of at least one director of the respondent in order to have legal effect which is not the case in the instant matter.

In further response to the fourth ground, the learned counsel contended that, the respondent disputed the alleged sales reports and the reconciliation report too. She further distinguished the case of **Trade Union Congress of Tanzania (TUCTA)** (supra).

Arguing in reply to the fifth ground in which the appellant faulted the learned trial Judge for basing her decision on the shut off of the CRS, the learned counsel contended that, this is a baseless and unfounded ground because the CRS was crucial for the operations of the respondent as all sales, refunds and cancellation were reflected in the system. According to the learned counsel, exhibit P2 which the appellant seeks the Court to believe was produced from CRS hence its closure affected the respondent from coming up with a realistic number of tickets sold, refunded and cancelled. In her view, the learned trial Judge was right to come to the conclusion that the appellant's conduct of shutting off the CRS without prior notice to the respondent denied the latter the opportunity to verify on any pending claims.

In reply to the sixth ground of appeal, the learned counsel for the respondent was equally brief. She contended that, the allegations that the learned trial Judge brought up extraneous matters is unfounded and misleading. Illustrating, she submitted that, the appellant is trying to mislead the Court since issues of cancellations, refunds and reconciliation were pleaded by the respondent in the written statement of defence and evidence adduced through the witness statement of DW1 and also testified by DW1 citing pages 39 and 40 of the record of appeal. She further argued that, these issues were brought up by the respondent when she claimed that it was denied the right to verify from the CRS before it was shut off without prior notice and this fact was not disputed by the appellant. The learned counsel referred us to pages 2202 and 2203 as well as page 782 of the record of appeal to buttress his proposition and rounded off by contending that it was erroneous to argued that the trial court relied on extraneous matters.

Submitting in response to the final ground of appeal, the respondent argued that, the appellant is misleading the Court as there is nowhere in the record of appeal where the trial court held that the respondent had failed to remit sales proceeds to the appellant. In her view, and rightly so in our considered opinion, the trial court dismissed both the main suit and

the counter claim for failure of both parties to prove their respective cases. As such, there was no such holding that the respondent failed to remit the sales proceeds. The learned counsel referred to us page 845 of the record of appeal where this holding of the trial court is explicit. She further argued that, all the cases cited by the appellant in support of this ground are irrelevant and distinguishable for the reason that both the main suit and the counter claim were dismissed. As such there was nothing to assess as damages for either of the parties before the trial court. In all, she urged us to dismiss the appeal in its entirety.

In rejoinder submission, Mr. Masumbuko reiterated his earlier submission in chief and argued that the issue of reconciliation was not raised by the parties but it was introduced by the learned trial Judge in the course of composing the judgment. He further argued that there is nowhere in the judgment of the trial court where the judge stated that the appellant did not prove damages and finally, the learned counsel contended that, Kenyan authorities cited by the respondent were merely persuasive. He once again prayed that the appeal be allowed.

It is now our duty to determine the appeal by considering the competing arguments made by the learned counsel for the parties in line with the grounds of appeal. We propose to dispose the appeal in the

manner preferred by the counsel for the appellant who consolidated some of the grounds of appeal.

Starting with the first ground whose main complaint is that the learned trial Judge raised a new issue of notice of reconciliation and claimed that there was no proper notice of reconciliation and parties did not address the court on it. Mr. Masumbuko complained that the learned judge picked the issue of reconciliation as a determining factor, claiming that, there were claims of refunds and reconciliation that were raised. On her part, Ms. Mlemeta was of the view that, and rightly so in our mind, reconciliation report was not a new thing as it featured explicitly in the pleadings, particularly paragraph 4 of the written statement of defence at page 38 of the record of appeal as well as witness statement of Yohana Mtweve (DW1) at page 2202 of the record of appeal. Furthermore, paragraph 5 of the plaint the appellant stated that parties met for reconciliation.

We think, with respect, there is considerable merit in the submission by the counsel for the respondent that, the learned trial Judge was justified in resolving the issue of reconciliation which was conspicuous on record and considering that parties dealt with it extensively in evidence. Even if we assume for the sake of argument that, parties did not give

evidence on the issue of reconciliation, the position of the law is very clear and settled that, the court is not precluded from determining an issue which though not framed parties left it upon the court to determine. In **Odd Jobs v. Mubia** (supra) it was decided by the defunct East Africa Court of Appeal, that, a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. In the case of **International Commercial Bank Limited v. Jadecam Real Estate Limited**, Civil Appeal No. 446 of 2020 (unreported), in which the respondent pleaded fraud in the transaction revolving around a mortgage finance which was denied by the appellant but no specific issue was framed, we made it very clear that, the trial court is not precluded from deciding an issue which, though not framed, parties left it for its determination.

We are settled in our mind without any shade of doubt that the issue of reconciliation having been pleaded by both the appellant and the respondent, and having being dealt with extensively in evidence, was left to the court for its decision and the learned trial Judge rightly determined it. In view of the foregoing, the first ground of appeal is misconceived and therefore is hereby dismissed.

Next, we will deliberate on the complaint that the learned trial Judge did not give any weight to the sales reports (exhibit P2) which was the most critical piece of evidence in the dispute as the suit based upon unremitted sales proceeds. According to the appellant, the respondent did not object the admissibility of sales reports (exhibit P2), reconciliation agreement and statement (exhibits P5 and P6). However, the respondent had an opposing view, in that the learned trial Judge was right in finding that the appellant was unable to prove the issue of reconciliation despite the fact that the respondent did not object the admissibility of the said documents. In her view, which we find to be the correct position of the law, failure to object admissibility of a document does not necessarily amount to admission of its contents, rather the admission of a document during trial is limited to the document having met the admissibility criteria. Put simply, admissibility of a document is one thing, and credibility of that very document is another thing all together. In our considered opinion the learned trial Judge was undeniably right in determining the issue of reconciliation as indicated in our deliberation of the first ground above. We, therefore, find that this ground has no merit and we dismiss it.

Turning to the third ground of appeal which was argued conjointly with the additional grounds of appeal, in our considered opinion, these

grounds should not detain us for the reason we shall explain shortly. Our reading of the record clearly reveals that, on 9th June, 2020 at page 818 of the record of appeal the appellant's counsel prayed for the remaining witness statements to be struck out of the record a prayer which was accordingly granted by the trial court in terms of rule 56 (2) of the Rules of the Commercial Court. For clarity, that provision reads as follows:

> *"Where the witness fails to appear for cross examination, the Court shall strike out his statement from the record, unless the Court is satisfied that there are exceptional reasons for the witness's failure to appear."*

Therefore, faulting the learned trial Judge for her failure to draw an adverse inference is with respect unfounded. We are unable to see how could the appellant's counsel on one hand pray for the witness statements to be struck out and at the same time fault the learned trial Judge for not drawing adverse inference for something which the appellant's counsel was the prime mover. We therefore, find merit in the respondent's counsel submission that the learned trial Judge properly assessed the evidence on record and rightly came to the conclusions that there was no reconciliation since Iddi Nassoro was not authorized to participate in the reconciliation. Therefore, ground three and the additional grounds are held to be devoid of merit. They are accordingly dismissed.

The main complaint in the fourth ground of appeal is on the authority of Iddi Nassoro attending the reconciliation meeting and signing the reconciliation report which was the basis of the appellant's claim. According to the appellant, it was not correct for the learned trial Judge to conclude that Iddi Nassoro had no authority in terms of Clause 3 of the PSA. His view was that, reconciliation is not governed by clause 3 of the PSA rather, clause 2.2 thereof, which does not require a contact person. However, the respondent had an opposing view, to her the judge of the High Court correctly held so since the PSA clearly and expressly provided names of contact persons and their respective addresses for notice purposes and Iddi Nassoro was not one of them, and therefore, he could not enter any agreement on behalf of the respondent without there being formal notice and authorization from the respondent to do so.

The question before us is whether the appellant in the instant appeal complied with the letter and spirit of the agreement as required under clause 3 of the PSA in conducting the alleged reconciliation. Our reading of the record quite clearly reveals that the appellant did not comply with clause 3 of the PSA in that, the appellant did not serve the respondent with a formal notice regarding the reconciliation. Even more-worse, the alleged reconciliation meeting was attended by someone who was not

authorized by the respondent to sign the agreement in total disregard of the requirements of clause 3 of the PSA. It has to be noted further that, no explanation, leave alone reasonable explanation, was offered why the appellant could not follow the conditions stipulated in the PSA.

We think, with respect, there is considerable merit in the submission by the counsel for the respondent that the appellant was duty bound to issue notice in terms of clause 3 of the PSA before the alleged reconciliation was conducted. Once contracts are signed then parties are duty bound to comply with the terms and conditions of that contract and in our considered opinion, the appellant did not comply.

We hasten to state that, a thread runs through our contract law that, effect must be given to the reasonable expectations of honest parties to the contract. The function of the law of contract is to provide an effective and fair framework for contractual dealings and it is on that account that the function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the instant appeal, the intention of the parties was expressly stated in clause 3 of the PSA which, quite unfortunate, was not followed by the appellant.

It is a peremptory principle of law that, contracts belong to the parties who are free to negotiate and even vary the terms as and when

they choose. We took this view in the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R. 288. In that case, we quoted with approval the principle of *Sanctity of Contract* as stated in **Chitty's Law of Contracts**, Volume 1, 24th Edition at page 5 where it is stated that, the law is consistently reluctant to admit excuses for non- performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement. We made corresponding observations in the case of **JNM Mining Services Ltd v. Mineral Access Systems Tanzania Limited**, Civil Appeal No. 395 of 2019 (unreported) in which the appellant did not issue notice of termination of contract as stipulated in the agreement prior to formal termination of the contract and we found that to be a total disregard of the contractual obligation.

We heard Mr. Masumbuko arguing that, the notice in question did not apply to reconciliation of account. We wish to make it very clear that, the learned counsel is not, with respect, correct in his assertion because clause 3 of the PSA is very explicit in that, any notice required by the PSA to be issued to either party has to comply with three requirements; **one**, to be in writing, **two**, to be sent to the head office and **three**, the same will be deemed received if sent personally or sent by post to the

designated persons and not otherwise. None of the three above was complied with by the appellant in carrying out the said reconciliation. We find no merit in this complaint and we reject it.

In the fifth ground the complaint is on the reliance by the learned trial Judge in the CRS shutting off as a basis for dismissing the appellant's claims. Whereas, the appellant claims that the learned trial Judge erred relying on the CSR because it was not a sales report rather a mere computer system for ticket reservations purposes, the respondent argued that shutting off the CRS was crucial for operation of the respondent as all sales, refunds and cancellation were reflected in the system and even exhibit P2 which the appellant relied on is produced from it.

We have closely examined and considered the arguments for the learned trained minds in respect of this ground and in our considered opinion, since we have held that the reconciliation which was the main basis of the appellant's claims was not done in compliance with clause 3 of the PSA, it will be pretentiously academic to delve much on this aspect. Suffices to say that, the argument by the appellant's counsel that the CRS had nothing to do with reconciliation as the respondent had already generated and issued sales reports (exhibit P2) and the contention by the respondent's counsel that the appellant's conduct of shutting off the CRS

without prior notice to the respondent denied the latter the opportunity to verify any pending claims are not relevant now that we have already held that the reconciliation was not done in compliance with clause 3 of the PSA. We, therefore, find no merit in this ground and reject it.

In relation to the complaint that the learned trial Judge introduced extraneous matters of cancellation and refunds of tickets knowingly that these were part and parcel of the counter claim which was dismissed, we equally feel that this matter should not detain us. We agree with the learned counsel for the respondent that, this contention is unfounded and misleading because issues relating to cancellations, refunds and reconciliation were pleaded by the respondent in the written statement of defence and featured prominently in the witness statement of DW1. Under the circumstances, we do not agree with Mr. Masumbuko's argument that, the learned trial Judge was swayed into considering extraneous matters of cancellation and refunds as the basis of dismissing the reconciliation. The record bears out clearly that these issues were brought up by the respondent when she claimed that it was denied the right to verify from the CRS before it was shut off without prior notice, and, as rightly argued by the counsel for the respondent, this fact was not disputed by the appellant. This ground too has no merit and we dismiss it.

Having dismissed all the six grounds of appeal, we do not find merit to belabour much in the final ground of appeal on the complaint that, the learned trial Judge erred in failing to award damages, interest and costs of the suit after dismissal of the counter claim, we accordingly dismiss it.

In view of the foregoing, we find no merit in the appeal and we are loath to meddle with the findings of the High Court and we dismiss it in its entirety. Considering the circumstances of this case each party shall bear own costs.

DATED at **DAR ES SALAAM** this 15th day of April, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 16th day of April, 2024 in the presence of Mr. Roman Masumbuko, learned counsel for the Appellant and Ms. Elizabeth John Mlemeta, learned counsel for the Respondent, is hereby certified as a true copy of the original.

A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL