IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CIVIL APPEAL NO. 19 OF 2020

SPENCON SERVICE (T) LTD ..... APPELLANT

VERSUS

D4N COMPANY LIMITED ..... RESPONDENT

(*Arising from the Civil Case No. 11/2018 District Court of Musoma)*

JUDGMENT

30th July & 16th August, 2021

Kahyoza, J.;

D4N Co. Ltd (D4N) sued SPENCON Service (T) Ltd (SPENCON) for specific performance of the contract and general damages to the tune of Tzs 100,000,000/= D4N emerged successful. The District Court ordered SPENCON to deliver to D4N all terms purchased as per the sale agreement. Aggrieved, SPENCON appealed to this Court on the following grounds:-

1. That the trial court erred in law and in fact by entertaining and determining the suit over which it had no jurisdiction as the appellant was under court administration.
2. That the trial court erred in law and in fact by entertaining the suit in which the administrator was not joined as a necessary party.
3. That, the trial court erred in law and fact by relying on exhibit "*Pl collectively*" that there was agreement between the parties herein

while the same does not qualify to be a company's contract on face of it.

4. That the trial court erred in law and facts by holding that one Manoj Kumar Sanghan was authorized by the Appellant, that the purported money should be deposited to his account on behalf of the company but he was never called by the respondent to prove the same.
5. That, the trial court erred in law and facts by decided a case in favour of the respondent while the suit was not proved on the standard required in civil cases.

The above grounds of appeal raised the following issues: -

a) Did the trial court have jurisdiction?
b) Was the trial court justified to try the case in the absence of a necessary party, the administrator?
c) Was it proper to rely on Exh. P1?
d) Was Manoj Kumar Sanghan authorized to receive money on behalf of the appellant?
e) Did D4N prove the case on the required standard?

Background; the undisputed facts are that D4N procured equipments from SPENCON. D4N's representative signed an agreement with Guru Mankus authorized official of SPENCON. The sale agreement directed D4N to deposit the purchase sum into the account of Manoj Kumar Sanghan. D4N complied with the terms of the sale agreement but

SPENCON defaulted to honour her part of the agreement. It is SPENCON's failure to honour the agreement, which sparkled this case.

This is a first appeal, which is in the form of a re-hearing. For that reason, I will review the evidence on record and consider the grounds of appeal. See **Dinkerrai Ramkrishnani Pandya V. R** (1957) EA 336). In the case of **Peters V Sunday Post Limited** (1958) EA 424 Sir Kenneth O'Connor,P. of the then Court of Appeal for Eastern Africa after considering **Watt V. Thomas** (1947) AC 484 stated as follows at page 429-

> *"it is a strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellant court might itself have come to a different conclusion."*

It is trite law in civil proceedings that he who alleges has a legal burden to prove the allegation. The standard of proof is on balance of probabilities. See section 110 and 111 of the Evidence Act, [Cap 6 R. E 2019] and the case of **Barelia Karangirangi V. Asteria Nyalambwa** Civil Appeal No. 237/2017 cited by the appellant's advocate and **Anthon M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)** Civil Appeal No. 118 of 2014 CAT (Unreported).

Thus, D4N the plaintiff had a legal duty to prove the allegations that he entered into the contract with SPENCON to procure equipment and paid the agreed price. D4N had also a duty to prove that SPENCON defaulted to deliver the equipments as agreed. The trial courts record showed that each side summoned one witness. D4N's witness John Andrew Chenge who deposed that SPENCON advertised the sale of equipments in the newspaper. He inspected the equipments at SPENCON's office. John Andrew Chenge (PW1) the director of D4N offered to buy the equipment. They signed a sale agreement and D4N paid the agreed sum. John Andrew Chenge tendered the sale agreement for each equipments, which the trial court admitted collectively as Exh. P1. He also tendered certified cash deposit slip.

Although the documents were certified copies of the original were admitted without objections from the appellant.

Erick Eugen Malale, a civil engineer gave evidence for the appellant that he did not know that D4N bought SPENCON equipment. He deposed that only SPENCON management can explain. He added that SPENCON's administrator and Directors whereabout was not known.

Based on the above evidence the trial court decided in favour of D4N. The appellant did not tender any exhibit to prove that she was under receivership at the time D4N instituted the current suit. I examined the pleadings and found that the appellant made a strong case on the paper and her advocate presented a strong case in her submission but poor case

during trial. SPENCON paraded very weak evidence. SPENCON also raised four limbs of preliminary objection, which she failed to prosecute.

The gist of the preliminary objection is the bases of the some of the grounds of Appeal. Pleadings bind the parties but cannot be the bases of making decision. The decision is based on the evidence tendered which include oral and documentary evidence. To form part of the record, a document must be admitted in evidence. Document annexed to the pleadings do not form part of the court record. See the case of **Japan International Cooperation Agency (JICA) V. Khaki Complex Limited** Civ. Appeal No. 107/2004, where the Court of Appeal stated that-

> *"It is evident from Rule 7(1) that a document which has been admitted in evidence shall form part of the record of the suit. The record shows that only P1 and P2 were admitted in evidence. The rest of the exhibits referred to in evidence and in the judgment were not so admitted."*

Did the trial court have jurisdiction?

SPENCON, the appellant, complained that the trial court erred in law and fact to determine the suit over which it had no jurisdiction as the appellant was under court administration. The appellant's advocate Fadhil R. Kingu, submitted that section 250(3) of the **Companies Act**, [Cap. 212 R.E. 2002] restricts any proceedings including legal process to be

commenced or continued against the company once an order for administration has been made. The said section provides

> "250.-(3) During the period for which an administration order is in force-
>
> *(a)* ...
>
> *(b)* ....
>
> *(c)*
>
> *(d)* *no other proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the administrator or the leave of the court and subject (where the court gives leave) to such terms as aforesaid."*

He added that the appellant indicated in the written statement of defence that she was under court administration. He added that it was further indicated in the written statement of defence that D4N did not obtain consent from the administrator or leave from the Court for commencing or instituting the suit. He concluded that the trial court failed to determine first if it was clothed with jurisdiction.

D4N submitted in reply that SPENCON has never been under court administration in accordance with the laws of Tanzania. It is true that SPENCON's written statement of defence disclosed a strong case that the

trial court had no jurisdiction. However, SPENCON did not argue the preliminary objection or tender any evidence during the trial to show she was under court administration. It is evident that pleadings and annextures thereto cannot be the bases of making the decision. It is the evidence on record which forms the bases. It should be also remembered that the advocate's submission is not evidence, SPENCON failed to argue the preliminary objection raised in the written statement of defence. She also failed to adduce evidence to prove that he was under court administration. It was very easy for SPENCON to establish that she was under court administration, by tendering the court order.

This Court is not in the position to determine the issue whether SPENCON was under receivership or not as there is neither evidence on record to show that SPENCON was under court administration nor did the trial court consider that issue. This is the first appellate court. It is trite law that matters not canvassed by lower court(s) cannot be raised and canvassed by the appellate court. See the case of **Farida and Another V. Domina Kagaruki** Civ. Appeal No. 136/2006 (CAT Unreported) where the Court of Appeal held that-

> *"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

It is evident that SPENCON pleaded the issue of e trial court lacking jurisdiction because SPENCON was under Court Administration. She did not

argue or tender evidence during trial that she was under court administration. SPENCON has raised the issue before this Court without the same having been canvassed by the trial Court. This against the established principle that the appellate court cannot deal with issues not considered by the trial court. In addition to that, SPENCON did not establish that she was under court administration. There is no such evidence on record. The first ground is bound to fail. I dismiss it.

Was the trial court justified to try the case in the absence of the necessary party, the administrator?

SPENCON complained in the second ground of appeal that the trial court erred in law and in fact to entertain and determine the suit in which the administrator was not joined as a necessary party. To support the ground of appeal, the appellant's advocate submitted that Erick (Dw1) deposed that SPENCON was under court administration and mentioned the administrators as Lilian Maswe and Kelvin Braire. He concluded that despite the pleadings and evidence the trial court proceeded to determine the suit while it had no jurisdiction.

D4N replied through her advocate that Erick Eugen Malla (Dw1) did not prove that SPECON was under court administration in accordance with the laws of Tanzania.

It is self-evident that the allegation that a given company is under court administration must be proved. The fact that Erick (DW1) deposed

that SPENCON was under court administration was not enough. I am alive of the settled position of the law that a fact in issue may be proved by oral or document evidence or by both oral and documentary evidence. However, there are facts which must be proved by documentary evidence. The fact that SPENCON was under court administration is one of such facts which ought to be proved by documentary evidence. By practice courts of commonwealth transact through written documents. Court's order or direction are either given in writing or given orally and reduced in writing. Thus, it is vital to produce a document to prove the existence of anything done, approved or certified by the court.

The Court of Appeal in the case of **Japan International Cooperation Agency** (JICA) (supra) denied the urge to rely on the oral evidence to determine the case in the absence of properly admitted documents. It is observed.

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

In present case, the trial magistrate was justified to disregard the allegation that SPENCON was under court administration for want of the order. There was no documentary evidence to prove that. Not only that but

also Erick (Dw1) did not explain how did he know that fact because he deposed that he was not part of the management of SPENCON. One would have expected the administrator to testify and tender relevant documents to prove that he was so appointed.

I am of the firm view that SPENCON did not prove that there were administrators appointed in accordance with the law. I dismiss the second ground of appeal. There was no proof that the necessary party existed.

Was it proper to rely on exhibit P1?

The appellants' advocate submitted that Exh. P.1 collectively did not qualify to be relied upon as a sale agreement between the parties. He contended that it was a cardinal principle of law that, the company's contract shall be signed by the director or company secretary and shall have a common seal of the company. The sale agreements which D4N tendered as Exh. P1 collectively did not contain and or having those requirements of S. 39(1) and (2) of the Companies Act.

The respondents' advocate replied that the issue of qualification of exhibit "P1" was not raised before the trial court. SPENCON raised it for first time before the court. He submitted that it is trite law that new facts are not allowed on appeal stage. To buttress his submission, he cited the case of the **National Bank of Commerce Limited V. Lake Oil Limited**, Commercial Appeal No. 5 of 2014 H/C (T) unreported, where it was held *that an issue not raised at the trial will not be entertained on appeal.*

I am in total agreement with the appellant's advocate that the company not only act through directors and that when it comes to the issue of signing documents, the same must be either signed by the directors or the company secretary and it must be sealed. Exh. P1 was not signed by the SPENCON's director or the company secretary or by persons alleged to hold the offices.

It is also true that SPENCON did not challenge the admission of Exh. P.1. It is trite law that whenever a document is admitted in course of trial without objection, it unquestionably goes to say that the contents of the document are also admitted. See **Kilombero Sugar Co. Ltd Vs Commissioner General** (TRA) Civ. Appeal No 261 of 2018 which quoted with approval the case of **P. C Purushottama Raddiar V. S. Perumal**, AIR 1972 S.C 608 thus,

> *".....where certain reports were marked without any objection it was not open to the respondent to object to their admissibility and that once such document was properly admitted, the contents of the document were also admitted into evidence though these contents may not be conclusive evidence"* [**emphasis added**].

As the Court of Appeal observed in **Kilombero Sugar's** case (above) sections 63 – 67 of the Evidence Act Cap. 6 govern proof of contents of a document, by primary or secondary evidence. Admittedly admission of a document is not conclusive proof of its contents. In the present case, there is no evidence to disapproved the contents of the sale agreement. Erick

(Dw1) deposed that he did not know if D4N bought items from SPENCON. He stressed that it is a person from the management who may testify if D4N bought equipments. D4N never summoned a person from the administration or even the alleged administrators to testify. Thus, the probative value of Exh. P1 remained unchallenged. It cannot be challenged by the advocate's submission, however ably it may be, submission is not evidence.

There is no reason to fault the trial court for relying on Exh. P1. I find the oral evidence of John A. Chenge (Pw1) and the pay in slip sufficient to prove that D4N bought equipments from SPENCON. I will move to the next issue.

Was Manoj Kumar Sanghan authorized to receive money on behalf of the appellant?

The appellant's advocate challenged the trial court's finding that money deposited to one Manoj Kumar Sanghan's account was the Company's money. He contended that Manoj Kumar Sanghan was not one of the Directors or administrators. He submitted that the trail court erred to rely on the mere words of John A. Chenge (Pw1) that Manoj Kumar Sanghan was authorized by the appellant to receive money. He added further that the appellant being a legal person, acts through the board of directors' resolution. There was no any resolution which was tendered before the trial court to show that SPENCON convened a meeting and authorized the said Manoj Kumar Sanghan to receive money on its behalf.

The respondent's advocate replied that John A. Chenge (Pw1) told the trial court that he paid the purchase sum as per the agreement and that it was not the first time they procured equipments from SPENCON.

I am in total agreement with the appellant's advocate that the Company performs the duties through the directors. The directors must make a resolution to that extent. In the present case John A. Chenge (Pw1) deposed that SPENCON offered for sale of her equipments and D4N tendered the agreement which was executed. The appellant Erick (Dw1) who deposed that he was not part of the management, he could not tell whether the D4N bought SPENCON's equipments. Erick (Dw1) deposed as quoted by the respondent's advocate that "*also (I) do not know the indoor activities of the defendant but (I) only saw (her) property being attached by the court broker*". Erick (Dw1)'s evidence cannot be relied upon to deny the contention that Manoj Kumar was not authorized to receive money on behalf of the company. One would have expected the Director or the administrator to give evidence, denying to have appointed any person to sell the equipments and deposit money in Manoj Kumar Sanghan's account.

I find on the balance of probability that D4N paid the purchase price to Manoj Kumar Sanghan as agreed and there is no evidence to show that he (Manoj Kumar Sanghan) was not authorized to receive money on behalf of the company. It is settled a party or the plaintiff is under *prima facie* duty to call those witnesses who from their connection with transaction

question are able to testify on material fact. The position which was stated in the case of **Hemedi Said V. Mohamed Mbilu** (1984) TLR 113 where the Court held that

> *"Where for undisclosed reasons a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called. They would have given evidence contrary to the party's interest."*

The principle in **Hemed Said**'s case applies to both parties. In the present case D4N summoned John A. Chenge (Pw1) who proved that he deposited money in Manoj's account as agreed and proved it. He had no duty to call Manoj Kumar Sanghan. It was upon SPENCON to prove that she had not authorized anyone to receive money on her behalf. That was not done.

Did D4N prove the case on the required standard?

The last issue to consider is whether D4N proved the case on required standard. The appellant's advocate submitted that the trial court erred to rely on Exh. P1 Collectively which does not tally with the claimed amount in the plaint. He submitted that the sale agreement and bank slip, attached to the plaint show the amount claimed as USD 84,000/= and that John A. Chenge (Pw1) testified that the claimed amount was USD 89,500. He added that it is trite law that parties are bound by their pleadings and evidence adduced cannot depart from what was alleged or court to grant what are not pleaded and proved. To support his submission, he cited the

case of **Makori Wassaga V. Joshua Mwaikambo and Another** [1987] T.L. R 88, where the Court of Appeal held that-

> *"In general and this is I think elementary a party is bound by his pleadings and can only succeed according to what has averred in his pleadings and proved in evidence"*

D4N's advocate while admitting that a party is bound by his pleadings he contended that clerical mistakes arising from accidental slip or omission can be corrected at any time. He cited the case of **Jewels & Antiques (T) Ltd V. National Shipping Agencies Co Ltd** (1994) TLR 107.

I will not dwell on this issue. There is no dispute that D4N's claim was equipments with the value of USD 84,000/= equivalent to Tzs. 176, 400,000/= as shown under paragraph 3 of the plaint. A party cannot be awarded what he did not pray for. I scrutinized the trial court's judgment and found that it found that the plaintiff paid the defendant Tzs 176,400,000/= and that amount of money was deposited into DIAMOND TRUST Bank, Account No. 7063222001. There is nowhere in the judgment where the trial court awarded USD 89,500/=. The reliefs the trial court granted are two, which are; **one,** the defendant hand over all the purchased items and **two**, the defendant to pay the costs of the suit.

In fine, I agree with the principle that a party is bound by his pleading but I do not agree that D4N was awarded over and above what she pleaded.

Having considered the evidence of John A. Chenge (Pw1) and Erick (Dw1), I am of the firm view that D4N proved the case in the required standard. John A. Chenge (pw1) deposed that D4N offered to buy the equipments and deposited money as agreed. On the other hand, Erick (Dw1) deposed that he did not know if D4N bought equipments from the SPENCON. Erick (Dw1) added that only person from the management would tell whether such an agreement existed or not. SPENCON did not call any person from the management to refute John A. Chenge (pw1)'s evidence. I therefore, find like the trial court, that the D4N proved the claims on the balance of probabilities.

In the end, I find the appeal without merit and dismiss in its entirety with costs. It is ordered accordingly.

J. R. Kahyoza
JUDGE
16/8/2021

Court: Judgment delivered in the presence of Mr. Gervas Genya virtually and in the absence of the respondent. B/C Mr. Makunja Present.

THE HIGH COURT OF TANZANIA
MUSOMA

J. R. Kahyoza
JUDGE
16/8/2021