IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CIVIL APPEAL NO. 33 OF 2022

(Originating from Civil case No. 17 of 2021 at the Resident Magistrate Court of Mwanza at Mwanza)

FIRST ASSURANCE COMPANY LIMITED .....APPELLANT

VERSUS

JUMEME RURAL POWER SUPPLY COMPANY LTD .....1ST RESPONDENT

KCG AQUATECH FISH FARMING CONSULTANCY CO. LTD.....2ND RESPONDENT

JUDGEMENT

Date of Last order 20/9/2022
Date of Judgment 27/09/2022

R. B. MASSAM, J.

This appeal under discussion is against the decision of the Resident Magistrate court, Brief of facts of this matter was that 1st respondent and 2nd respondent entered into a business for cage fish farming project on 22/10/2020, and the said agreement had the value of Tshs 208,800,000/=.

The 2nd respondent was required to construct 30 fishing cages for the 1st respondent, supply fish ginger lings and their food and provide consultancy on the case fish farming project to its stage of harvesting the fishes. Also, they agreed that there should be an insurance bond. So, in this agreement 1st respondent was the beneficiary who was to pay 2nd respondent Tshs. 140,000,000/= as advance payment against any delay or substandard in the work done. All payment was done, but nothing happened, so 1st respondent started to reach out 2nd respondent by various means of communication but fail to reach him so due to that decays he decided to bring the matter to the court.

After hearing of the parties and scrutinizing the exhibits the trial court in its decision dated on 23/5/2022 ordered the 2nd defendant (appellant) to pay the plaintiff the amount of Tshs. 148,000,000/=, an interest on the decretal sum at the tune of 7% per month from the date of judgment till final settlement of the same, costs of the suit, any other further order and reliefs this honorable court deems fit and just to grant.

That decision did not please the appellant who appealed to this court with five grounds of appeal; that:

1. That, the learned trial Magistrate erred in law and facts by entertaining the matter in which had no jurisdiction.
2. That, the learned trial, Magistrate in law and facts to enter judgment in favor of the 1st respondent basing on insufficient evidence That, the learned trial Magistrate erred in law and facts when held the appellant s liable while there was ample evidence to support that liability id any was in the party of the 2nd respondent particularly.
3. That, the learned trial Magistrate erred in law and facts misinterpreting the principal on the extent of liability between the appellant and 2nd respondent.
4. That, the learned trial Magistrate erred in law and facts when declared that the appellant was in breach of contract with the 2nd respondent while the appellant admittedly to terminate the said contract
5. That the learned trial magistrate erred in law and facts when declared that the appellant was in breach of contract with the 2rd respondent while the appellant admittedly to terminate the said contract.

Based on the above grounds of appeal appellant implored this court to set aside the judgment and decree thereof and appeal allowed in favor of the appellant.

Before me at the hearing of this appeal, the appellant was represented by Miss Regina Herman learned advocate while 1st respondent was represented by Mr. Davis Muzahula, and 2nd respondent Baltazar Mahay learned advocate. Arguing in support of appeal counsel for the appellant informed this court that she will drop grounds of appeal number 3, 4 and she will urge ground number 1, 2 and 5, by starting with ground number 1, which deals with jurisdiction.

On the first ground, she said that this court has no jurisdiction because the matter arises out of the contract as it was reflected on exhibit P1 which was admitted by the court. Again, he submitted that the contract had a value of Tshs. 208,80,000/= and because the dispute falls under the business, so it was required to be filed at high Court commercial court, she submitted further that rule 5(1) of the High Court Commercial Rules and under section 40(3)(a) and (b) of The Magistrate Court Act Cap. 11 RE: 2019, directs the jurisdiction of District Court in the matter concerning commercial cases, so according to the said rules and amount claimed in the plaint the matter was

supposed to be filed at the High Court. To cement her submission, she refers to the case of **Tanzania Electricity Supply Company Limited vs. Independent Power Tanzania Limited,** on page 324 in this case, it was held that jurisdiction is a creature of the statute also the case of **Scova Engineering S.PA vs. Mtibwa Sugar Estate Limited and 8 others,** Civil Appeal Number 133 of 2017. He insisted that in the cited cases above, the appeal was dismissed as the court had no jurisdiction, so she prays this court to nullify the proceedings and allow be appeal.

On the 2nd ground of appeal, counsel for the appellant alleged that, the trial court did not consider the evidence brought as it was weak and it was hearsay evidence. PW1 told the court that she was employed on July, 2021, and the said contract was signed on 22/10/2020, so she was not around when the said contract was signed, so the plaintiff side did not prove their case, especially in the issue of general damage. She supports her argument with the case of **Saruji Cooperative vs African M** [2004] TLR, which held that general damage is awarded in the discretion of the court.

Again, she submitted by saying that there was no proof of payment as the court used exhibit P10 and say that money was deposited in account number 0150430724001 but the owner of that account was not disclosed.

In the case **AMI Tanzania Limited vs. Prosper Joseph Msele** in Civil Appeal No. 159/2020, the court discourages the use of in voice as evidence, so she prays again this court to allow the appeal for want of strong evidence.

In ground number 5, she submitted that the trial court erred in law when it declared that the appellant was in breach of contract with 2nd respondent while 1st respondent admitted to having terminated the contract and the court discourage the one who breach the contract to benefit on that see **M/s Universal Electronic and Hardware (T) Limited vs. Strabag International,** civil appeal number 122 of 2017.

In reply to what was submitted by the appellant, the counsel for 1st respondent urged that in the plaint the amount claimed was clear and there was no specific denial on that claim and also no denial that 2nd respondent did fail to honor the contract. On his side, he said that the appellant was only sued for indemnity guaranteed in favor of 2nd respondent and nothing else. In reply to the 1st ground that Resident Magistrate court did not have jurisdiction, he submitted that the said case was of breach of contract between 1st respondent and 2nd respondent, and the contract have a value of Tshs. 208,000,000/= the source of conflict was a breach of contract in which ordinary court had jurisdiction. He went on that, Section 13 of CPC

Cap. 33 R.E 2019, gave them an option to file at Resident Magistrate Court or District Court, so as per order 4 Rule 1 Sub-rule 4, directs that it is not mandatory a commercial case to be instituted to the commercial court, he supports his argument with the case of **A1 outdoor (T) Limited vs. Euro Consulting Limited,** in this case it was held that commercial court has no exclusive mandatory jurisdiction.

In reply to ground number 2, that there was insufficient evidence, he said that was not true as the court assessed the evidence tendered and demeanor of the parties, and even though PW1 was not around on the date of signing the contract, but she testified as an officer of 1st respondent, as 1st respondent was a cooperate body and in the issue of proof of payment, PW1 tendered invoices which show the account number which the payment was done, which supported by exhibit P.10, so there was a proof of payment,

In ground number 5 he submitted that in their testimony nowhere they claimed that appellant was in breach of contract, their claim to appellant was for indemnity, as appellant was Insurance Company, and he guaranteed 2nd respondent, so it is true that there was a breach of contract by 2nd respondent and not appellant, and the liabilities of Insurance is to pay just

in case liabilities occurred which was insured the insurer obliged to pay as promised to the commitment bond.

Lastly, in the issue of general damages, he replied that it is the discretion of the court and it is awarded for what parties suffered, in cross-examination 2nd respondent when asked why he failed to perform his duties as per contract, he replied that he was held in custody that why he was not reachable.

In reply to the submission of the appellant 2nd respondent submitted that he has nothing to add, he supports all submissions submitted by the counsel for the appellant. The counsel for the appellant in her rejoinder submitted that the issue of jurisdiction the counsel for 1st respondent brought to the court section 13 of CPC, this section deals with institution of the case also he cited section 40(2) of MCA but her issue falls under section 40 (3) (b), and section 7 of CPC, so again she said that she mention the rules of High Court Commercial Court purposely as they show its jurisdiction, so she still insists that Resident Magistrate court had no jurisdiction. In replying the issue of evidence, she said that the evidence brought by her fellow was a cooked one and hearsay evidence. Lastly, she said that the 1st respondent

was wrong to terminate the contract without notifying them as an insurer, so she prays the court to allow the appeal with costs.

I have dully considered the records of the trial court, exhibits, submissions for and against the appeal the pertinent issues for determination are: -

(1) Whether the trial court has jurisdiction to entertain the matter.

(2) Whether there was insufficient evidence.

(3) Whether there was a breach of contract and by who.

All grounds of appeal hinge on the evaluation and analysis of the evidence, it settled principle that this being appellate court is duty is to re-evaluate the evidence so as to come with just able decision.

Coming to the issue **whether the trial court had jurisdiction to entertain the matter** as raised by the counsel for appellant, she said that the matter was commercial in nature and the pecuniary jurisdiction is limited, this court found out that The Magistrate Court Act Cap. 11 R.E.2019 under section 2 defined what amount to commercial case, it reads that commercial case means a civil case involving a matter considered to be of commercial significance including but not limited to contractual relationship of business

or commercial organization with other bodies or persons outside it. Coming to the present case the dispute arose on the failure to fulfil terms of the contract by parties.

The law is settled that jurisdiction of any court is basic it goes to the very root of the authority of the court to adjudicate upon cases of different nature. The question of jurisdiction is so fundamental that courts must as a matter of practice on the face of it, be certain and assured of their jurisdictional position at the commencement of the trial, so it is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case. In the case of **Shyam Thanki and others vs. New Palace Hotel** [1972] HCD number 92, it held that: -

> *"all the courts in Tanzania are created by statutes and their jurisdiction is purely statutory, it is elementary principle of law that parties cannot by consent give a court jurisdiction which it does not possess".*

See the case of **Fanuel Mantiri Nguda vs. Herman M. Nguda** Civil Appeal No. 08 of 1995 Court of Appeal (Unreported)

In determining whether the matter was a commercial case we need to determine the nature of contact whether was a business contract or a

contract of service by looking at the contractual terms. It is my finding that, the contract between parties was a contract of service and therefore the matter could not qualify to be a commercial case, so based on that finding that was not a commercial case under Section 42 of The Magistrate Court Act Cap. 11 RE; 2019, the trial court was clothed with jurisdiction to entertain the matter.

This court reply to the issue that **whether there was insufficient evidence**, appellant counsel submitted that there was no sufficient evidence and PW1 was hearsay evidence, on the side of the respondent, the learned counsel said that they brought strong evidence which made the court to come up with the said decision as PW1 was an officer of 1st respondent her evidence was genuine so cannot be of hearsay. This court after perusing the court records finds out that PW1 was a principal officer of the 1st respondent therefore her evidence could not be treated as a hearsay as claimed by the appellant as she testified on behalf of 1st respondent. Also, PW1 tendered exhibits which proved her case in the standard required with section 110 of the Evidence Act Cap. 6 RE: 2019, the exhibits which established relationship between the appellant and 2nd respondent and all of them were not object ed at the trial by the appellant. It is my findings that objecting them in this

stage is an afterthought. The law is settled that he who wants the court to consider that certain facts exists, has the duty to adduce evidence to that effect. See the case of **Dr. A. Nkini and associate Limited vs. National Housing Cooperation** civil appeal no 72 of 2015, also in **Registered Trustees of the Archdiocese of Dares salaam vs The chairman Bunju village Government** in Civil Appeal No. 147 of 2006, **Anthony Masanga vs. Penina [mama Mgesi and Lucia [mama Anna]** civil appeal no 118 0f 2014[unreported] which cited in the case of **Geita Gold mining Ltd and another vs. Ignas At han** civil appeal no 227 of 2017.

The last issue to determine is whether **there where the breach of contract and by who the** court records is very clear that 1st respondent was the one who terminated the contract for failure of the 2nd respondent to perform the terms in the contract and the 2nd respondent in the trial did not deny. In addition to that, this court ask itself what was the duty of the appellant in connection to the contract records shown in exhibits P1, P2 and P3 where it is shown that the appellant step in this matter as an insurer in case the 2nd respondent fails to execute the contract and signed an advance bond on 16/10/2020, and in the trial 2nd respondent admitted to fail, so as a matter of practice the appellant was required to execute the bond and pay

the 1st respondent so the said failure of the 1st respondent triggers the appellant to indemnify the 1st respondent. This is supported by the case of **Livingstone v Raw yards cool co** [1880] 5 App. Cas 25 at page 39 Lord Blackburn said that damage to be that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. Also, see the case of **Victoria Laundry vs. Newman** [1949]2 Kb 528 at page 539 Asquith, LJ said that the purpose of damage is to put the plaintiff in the same position so far as money can do so, as if his rights had been observed.

From the foregoing reasons, I do not see any reasons to fault the lower court's evaluation of evidence as well as its findings.

In the upshot, this appeal is hereby dismissed in its entirety.

It is so ordered.

Dated at **Mwanza** this 26th day of September 2022

THE HIGH COURT OF TANZANIA MWANZA

R.B. MASSAM
JUDGE
27/09/2022

Judgment delivered on 27.09.2022 in presence of the appellant's learned advocate and in the absence of the respondents.

R.B. MASSAM
JUDGE
27/09/2022