IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KIHWELO, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 395 OF 2019

JNM MINING SERVICES LTD .....APPELLANT

VERSUS

MINERAL ACCESS SYSTEMS TANZANIA LTD.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Ngwala, J)

dated the 19th day of June, 2019
in
Civil Case No. 177 OF 2015
.....

JUDGMENT OF THE COURT

1st & 8th November,2022

KIHWELO, J.A.:

This appeal arises from the judgment of the High Court of Tanzania at Dar es Salaam (Ngwala, J.) in which the appellant, JNM Mining Services Ltd lost the case against the respondent, Mineral Access Systems Tanzania Ltd, which was dismissed on account of failure to prove its claim beyond the standard required in civil litigation. Aggrieved by the impugned decision the appellant has come before this Court by way of appeal.

The factual setting of this case as unveiled by the pleadings and the evidence during the trial may be recapitulated as follows. The appellant, is a limited liability company incorporated under the laws of Tanzania and carrying on the businesses of environmental impact assessment, topographical survey, mineral exploration and consultancy services. The respondent on the other hand, is a limited liability company incorporated under the laws of Tanzania and its principal business is mining services.

On 3rd September, 2014, the appellant and the respondent entered into a mining consultancy agreement upon which the appellant agreed and undertook to carry out a number of activities including conducting an extensive geological survey to define a possible copper resource or to determine whether Mbesa possesses the reserve to become a Copper Mine Reserve, conduct an exhaustive campaign of drilling in the defined area to determine the extent of the copper deposit (if any) in the Mbesa property within the maximum period of 3 to 6 months and rendering such clarifications as may be sought by the respondent in regards to the instructions and reports given by the appellant. In consideration of the appellant's undertaking and mining consultancy services the respondent undertook to pay fees as detailed in the mining consultancy agreement.

Among the fundamental terms of the mining consultancy agreement was the termination clause, which required either party wishing to terminate the agreement to communicate the material breach in writing and in a manner specified in the agreement in view of amicably settling the dispute.

It is alleged that, the appellant did mobilization of resources including machines, equipment and human resources but to its disappointment, and for the reasons best known to the respondent, the appellant was not let to execute the contract as agreed because it was denied access to the property which amounts to breach of contract that caused huge financial loss to the appellant who was prevented from performing its contractual obligations. Consequently, the appellant sued for breach of contract claiming among other things, TZS. 120,950,000 as special damages, interest on specific damages at the rate of 31% per month from the day of filing the suit and general damages to the tune of TZS. 100,000,000.00.

The respondent on its part totally refuted the appellant's claims and alleged that the appellant misinterpreted the contract since it had only accomplished phase one of the contract that is drilling campaign and it was accordingly paid for that phase. It was further alleged by the respondent that, the appellant upon completion of phase one was

required to give clarification on what conclusion would be drawn from the topographic survey and that the appellant then suggested as a means to proceed with drilling campaign, the extent of the copper deposits be determined something which would have exposed the appellant to irreparable loss. According to the respondent, the appellant's response in relation to the survey, the indications of copper anomalies could not be clearly given a fact which would expose the respondent to irreparable loss. The respondent alleged further that, the appellant did not want to seek clarification on how to progress with the contract upon rejection of the topographical survey. The respondent finally prayed that the suit be dismissed in its entirely with costs.

At the height of the trial on 19th June 2019 the High Court (Ngwala, J.) found out that the appellant failed to prove the case as hinted above and consequently, dismissed the suit in its entirely with costs.

The appellant presently seeks to overturn the decision of the High Court through a memorandum which is comprised of four points of grievance, namely:

1. *That the learned trial Judge erred in law and facts by unreasonably disregarding the fact and evidence tendered showing that the appellant issued notice to the respondent and respondent ended up terminating the agreement without any redress.*

2. *That the learned trial Judge erred in law and fact by holding that the appellant failed to prove his case while the case was proved to the standard required in civil case.*

3. *That the learned trial Judge erred in law and facts by failure to evaluate the issues framed and ended up misleading herself.*

4. *That the learned trial Judge erred in law and fact by imposing her own facts and made decision based on the imposed facts.*

When, eventually, the matter was placed before us for hearing on 1st November, 2022 the appellant had the services of Mr. Richard Mathias Kinawari, learned counsel whereas the respondent was represented by Mr. Denice S. Tumaini, learned counsel. Both learned counsel lodged written submissions either in support or 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 conveniently relevant to the determination of the matter before us. In the upshot, Mr. Kinawari invited us to allow the appeal with costs, whereas Mr. Tumaini urged us to dismiss the appeal with costs.

In support of the appeal, the appellant argued the first ground of appeal by faulting the learned trial Judge for her failure to acknowledge

that the appellant issued a notice of termination of contract in compliance with paragraph 5 of the Consultancy Agreement. Illustrating, the learned counsel referred to the email communication dated 10th January, 2015 which was written by the appellant and directed to the respondent and which according to the appellant was acted upon by the respondent who promised to make good the claim according to the email correspondence which were tendered and admitted in evidence during trial.

Elaborating further, the learned counsel contended that, apart from the notice which was issued by the appellant through the email as hinted above, on 5th May, 2015 the appellant's counsel East African Law Chambers issued a demand letter for breach of contract and in response to that the respondent terminated the contract on 1st July, 2015. He submitted further that, in any case since the contract was executed on 3rd September, 2014 and it was a six months contract, the termination letter by the respondent was of no legal consequences because there was no contract upon which to terminate as the same had already expired at the time of the alleged termination. It was only in the alternative that the provision of paragraph 5 of the consultancy agreement could have been invoked had the contract been still valid which is not the case, the learned counsel submitted. In rounding of this ground, the learned counsel submitted that the respondent is the one who terminated the contract.

Arguing in support of the second ground of appeal, the learned counsel zealously submitted that, the learned trial Judge erroneously held that the appellant did not prove the case to the standard required in civil case. Citing sections 110 and 111 of the Tanzania Evidence Act, Cap. 6 R.E. 2002, he argued that, the appellant apart from oral evidence, it produced documentary exhibits to support its case. He went further to refer to exhibit P2, email correspondence between the appellant and the respondent which according to him clearly indicates how the appellant was making follow up but in vain as the respondent merely ignored them.

Advancing further his support for the appeal, the learned counsel contended that, the appellant reiterated that the contract was for six months and it was the respondent who terminated it and long after it had already expired. In his considered opinion, the appellant incurred costs in terms of mobilization for the work which was neither performed nor paid for and that the only justification raised by the respondent was that the appellant was too expensive something which cannot be raised without varying the terms of the agreement. The learned counsel paid homage to the case of **Edwin Simon Mamuya v. Adam Jonas Mbala** [1983] TLR 410.

The learned counsel argued in further support to the appeal, grounds three and four conjointly, and faulted the learned trial Judge for what he called, her failure to address the framed issues and instead came up with her own facts that led her to a wrong conclusion. He went on to submit that, the issue of breach of contract on the part of the respondent had ample evidence to be answered in the affirmative as the respondent unilaterally terminated the contract both impliedly and expressly which amounted to a breach of contract. The learned counsel argued further that, the notice of termination was of no effect because the contract was not valid at the time when the notice was issued as the contract had expired long before.

The learned counsel contended that, nevertheless, the appellant and the respondent were in constant communication on the predicament of the execution of the contract as the appellant had already executed part of its bargain but the respondent was adamant to perform its obligation, something which occasioned loss to the appellant. The learned counsel, therefore prayed that the appeal be allowed as prayed with costs.

In response, the learned counsel for the respondent gallantly disagreed with the counsel for the appellant and argued in response to the appeal in a pattern adopted by the appellant. Essentially, he opposed the appeal by contending that, the learned trial Judge after carefully

considering the evidence on record, she rightly came to the conclusions that the appellant failed to prove that the alleged breach of contract was fully and accordingly communicated to the respondent as required and that the respondent was afforded such time as agreed in the contract in order to remedy the alleged breach.

Elaborating, the respondent's counsel submitted that, clause 5 of the consultancy services agreement clearly and in no uncertain terms provides for the procedure to be followed in the event of a breach. He went on to submit that, from the clear wording of clause 5 of the consultancy services agreement such a procedure required an innocent party to prepare and serve upon the party in breach with a written notice specifying the breach.

In further illustration the learned counsel, contended that, there are three components to be derived from clause 5 of the consultancy services agreement. **One**, the mandatory need to serve the party in breach with a formal notice specifying the breach, **two**, the mandatory requirement to afford the party in breach seven days within which to remedy the breach and, **three**, the means of service of the notice to the breaching party. The learned counsel zealously argued that the appellant did not comply with any of the listed procedural requirements of notice of breach under clause 5 of the consultancy services agreement.

Arguing further in opposing to the appeal, the learned counsel submitted that, the appellant is alleging to have served the respondent with a notice as required under clause 5 of the consultancy services agreement and referred to the email dated 10th January, 2015 but this was a misconception of the contract as clause 5 required notice to be communicated to the breaching party by hand or registered post to the last known address of the breaching party. He went further to submit that, in the absence of a formal notice as prescribed under clause 5 of the consultancy services agreement the suit was prematurely instituted before the High Court.

Faulting further the appeal, the learned counsel argued that, the demand letter from the appellant's counsel, East African Law Chamber was an act done as an afterthought having failed to issue notice in terms of clause 5 of the consultancy services agreement. He argued that, whether or not the contract had expired, the terms of the agreement remained valid and intact, since there was nothing which varied or nullified the terms of the agreement.

In reply to the second ground of appeal, the learned counsel for the respondent submitted that, the complaint by the appellant that, it proved its case to the standard required in civil case is without merit and the learned trial Judge was undeniably right to find that the appellant did not

prove the case and therefore dismiss it. In his strong opinion, the learned counsel argued that since the entire case rested on breach of contract the appellant was duty bound to prove that the breach was communicated to the respondent as required by clause 5 of the consultancy services agreement. Elaborating further, the learned counsel submitted at considerable lengthy how the appellant did not comply with the provisions of clause 5 of the consultancy services agreement, and finally contended that the learned trial Judge was right to come to the conclusions that the appellant failed to establish and prove its case to the required standard.

In reply to the third and fourth grounds of appeal which were argued conjointly by the appellant, the counsel for the respondent was fairly brief and submitted that, this Court should find that the learned trial Judge properly addressed all issues which were framed by the trial court and came to the conclusions that, based upon the evidence on record the appellant did not prove its case to the required standard in civil litigation.

After a careful consideration of the entire record and the rival submissions by the parties there remains only one contentious aspect that needs to be resolved and that is whether or not the appeal before us is meritorious.

We propose to begin with the first ground of appeal. The crucial issue here is whether the appellant failed to prove that the alleged breach of contract was fully and accordingly communicated to the respondent as required and that the respondent was afforded such time as agreed in the contract in order to remedy the alleged breach.

We think in an attempt to answer the above issue, it is desirable that we start by excerpting clause 5 of the consultancy services agreement which reads:

"TERMINATION

> *"This Agreement may be terminated by either party only for Cause, which the party in breach fails to remedy within seven (7) days* ***following receipt of written notice specifying the breach. Such notice shall be served by hand or sent by registered post to the last known address of the party in breach."*** *[emphasis added]*

The excerpt above is very categorical and conspicuously clear that a party wishing to terminate the contract for justifiable reasons shall serve the party in breach with a formal notice specifying the breach and shall afford the party in breach seven days within which to remedy the breach and the notice shall be served by hand or sent by registered post to the

last known address of the party in breach. The rationale for the termination clause is not farfetched, it is meant to afford an opportunity to the parties to the contract to smoothly sort out issues at the time of terminating the contract without breaching the contract.

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 5 of the consultancy services agreement. Our reading of the record quite obviously reveals that the appellant did not comply with clause 5 of the consultancy services agreement in that, the appellant did not serve the respondent with a formal notice specifying the breach, also the appellant did not afford the respondent with seven days' notice within which to remedy the breach and, finally the appellant did not serve notice to the respondent by hand or by registered post to the last known address of the respondent. It has to be noted further that no explanation, leave alone reasonable explanation, was given why the appellant could not follow the conditions stipulated in the agreement in as far as termination of agreement is concerned. The alleged email communications by the appellant to the respondent was not a notice in real sense of the agreement which the appellant was bound to follow.

We think, with respect, there is considerable merit in the submission by the counsel for the respondent that reference to the email dated 10th

January, 2015 as well as the demand letter from the appellant's counsel East African Law Chamber was a mere misconception of clause 5 of the consultancy services agreement. Contracts belong to the parties who are free to negotiate and even vary the terms as and when they choose. 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 and in the instant appeal, the intention of the parties was expressly stated in clause 5 of the consultancy services agreement which quite unfortunate was not followed by the appellant. We are fortified in this view by what we stated in the case of **Sinyoma Company Limited v. Bulyanhulu Gold Mine Limited**, Civil Appeal No. 172 of 2017 (unreported) in which faced with analogous situation where the issue of failure to issue notice for termination was discussed we held that:

"On the basis of the above stated reasons, it is our considered view that the respondent was duty bound to comply with clause 19 (c) of the contract by issuing to the appellant, 14 days' notice before terminating the contract. Failure to do so entails that the contract had not been terminated."

In view of the foregoing, the first ground of appeal is misconceived and therefore is hereby dismissed. Having dismissed the first ground of appeal we find no need to discuss the second ground of appeal which is automatically disposed as it is directly related to ground one.

Next, we will deliberate on the complaint that the learned trial Judge did not address the framed issues and instead came up with her own facts that led to a wrong conclusion. In our considered opinion, this issue should not detain us for the reason we shall explain shortly. Our reading of the record quite clearly reveals that the trial court on 19th May, 2016 framed three issues as seen at pages 38 and 120 of the record of proceedings.

We are alive to the time-honored principle of pleadings that each issue framed should be definitely resolved and that a judge is obliged to decide on each and every issue framed to resolve the dispute. See, for example **Alnoor Sharrif Jamal v. Bahadur Ebrahim Shamji**, Civil

Appeal No. 25 of 2006 (unreported) and **Sheikh Said v. The Registered Trustees of Manyema Masjid** [2005] TLR 61. Admittedly, in the instant appeal the learned trial Judge discussed at considerable lengthy the principles governing proof in civil litigation and in our considered opinion for obvious reasons that was inevitable given the fact that the central issue in the instant appeal was proof of breach of contract.

However, the trial Judge having deliberated at considerable lengthy as hinted above, she went ahead to discuss the extent to which the appellant did not manage to discharge the burden of proof while resolving the first issue and this is evident from pages 123 to 126 of the record of appeal. She went ahead to briefly resolve the second issue which in her considered opinion depended on the finding on the first issue which was answered in the negative and this is evident at pages 126 and 127 of the record of appeal and finally, the third issue was also dealt with at page 127 of the record of appeal.

In the circumstances, we find considerable merit in the submission by the counsel for the respondent in that the learned trial Judge resolved all the issues that were framed. We do not accept and find the argument by the learned counsel for the appellant to be incorrect. Therefore, grounds three and four are held to be devoid of merit. They are accordingly dismissed.

In view of the foregoing position, we find no merit in the appeal and we are loath to meddle with the findings of the trial court. Consequently, we dismiss it in its entirety with costs.

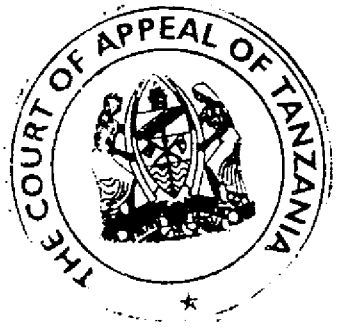
DATED at **DAR ES SALAAM** this 7th day of November, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 8th day of November, 2022 in the presence of Mr. Richard Mathias Kinawari, learned counsel for the appellant and Mr. Denice Tumaini learned counsel for the Respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL