IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CIVIL APPEAL NO. 172 OF 2017

SINYOMA COMPANY LIMITED ..... APPELLANT

VERSUS

BULYANHULU GOLD MINE LIMITED ..... RESPONDENT

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

(Songoro, J.)

dated 24th day of February, 2016
in
Commercial Case No. 102 of 2014

.....

JUDGMENT OF THE COURT

18th February & 29th June, 2022

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Commercial Division) sitting at Dar es Salaam in Commercial Case No. 102 of 2014 (the suit). The appellant, Sinyoma Company Limited instituted the suit against the respondent, Bulyanhulu Gold Mine Limited following a dispute between it and the appellant over a contract termed as "Purchase and Transport of Scrap Materials Sales Agreement" executed by them on 8/5/2021 (hereinafter "the contract").

According to the contract, the appellant, who was described as "the buyer" was to buy, collect, transport and dispose scrap materials from the respondent's gold mine after fulfilling the conditions stipulated in the contract. The conditions include those which are contained in clauses 24 and 25 of the contract. Under the former clause, the appellant was required to obtain insurance premiums for *inter alia*, workers compensation, employers liability, public liability as well as motor vehicles and equipment insurance premiums. The insurance covers were to be paid in USD currency. As for the latter clause, the appellant was to take out and provide for inspection, when demanded, all the insurance covers which ought to be in place prior to performance of the contract.

Having satisfied itself that it had complied with the terms and conditions of the contract, the appellant commenced the business and on 6/12/2012, it purchased from the respondent, 28,000 kgs of scrap materials worth TZS 7,150,000.00 (VAT inclusive). That was through invoice No. Buly Des. 6/2012. The invoice was admitted in evidence as exhibit P19. The receipt evidencing payment was also admitted in evidence as exhibit P8.

A day later, on 7/12/2012 however, the appellant was notified by the respondent through a letter, that it had terminated the contract. According to the letter which was admitted in evidence as exhibit P13, the

appellant had failed to comply with the conditions set out in clauses 24 and 25 of the contract pointed out above.

The appellant was dissatisfied with the reasons for termination of the contract. It thus instituted the suit in the trial court. In the plaint, the appellant contended that it complied with requisite conditions stipulated under the contract including those contained in clauses 24 and 25 and therefore, the termination thereof by the respondent was wrongful. It claimed that the respondent committed a breach and thus claimed for the following reliefs:

"(a) Payment of special damages amounting to TZS 2,512,902,000/= and United State Dollars 552, 400.00.

(b) Payment of deposit balance amounting to Tshs 57,124,000/=.

(c) Interest on (a) and (b) above at the rate of 20% for Tanzania Shillings and 12% for United State Dollars from the date of termination of the agreement ... to the date of judgment.

(d) General damages for beach of contract as the court may assess.

(e) Interest on the decretal amount at the rate of 7% from the date of judgment to the date of final satisfaction of the decree.

(f) Cost and any other reliefs that the honourable court may dream fit to grant."

In its written statement of defence, the respondent denied all the claims raised by the appellant and urged the trial court to dismiss the suit

with costs. It maintained, among other things, that the appellant had failed to comply with the conditions stated under clauses 24 and 25 of the contract.

During the hearing of the case, whereas the appellant relied on the evidence of three witnesses, Timoth Daniel Kilumile (PW1), Colodios Shoo (PW2) and Peter Shiganga Kusamba (PW3), the respondent called one witness, David Nzaligo (DW1).

The evidence adduced by the appellant's witnesses was to the effect that the conditions alleged to have been breached by the appellant were, to the contrary complied with. PW1 who was until the material time, the Director of the appellant company testified that the conditions precedent were complied with by the appellant, including the requirements stipulated in clauses 24 and 25 of the contract. He contended that the appellant hired four trucks, yards at Nyakato and Usagara areas, complied with environmental and safety regulations as stipulated in the contract and obtained a permit (exhibit P9) from the NEMC authorizing the appellant to carry out the business of collecting and disposing metal scraps.

The witness contended also that the appellant purchased insurance covers as specified in the contract. He tendered the receipts in respect of insurance premiums which were admitted in evidence as exhibit P4 and

also the receipts for payment of rental charges for Usagara yard which were admitted in evidence as exhibit P7.

The other two witnesses (PW2 and PW3) supported PW1's testimony. PW2 who was at the material time the appellant's Environmental Manager, testified that, by virtue of his position, he supervised collection and transportation of scrap materials from the mine's compound. He said also that he ensured that the contract was executed in accordance with the terms and conditions stipulated therein. According to him, the appellant obtained among other things, a permit from the NEMC and medical certificates for its employees who were involved in the scrap materials collection activity. He tendered the relevant certificates and the same were admitted in evidence as exhibits P22 collectively.

On his part, PW3 was employed by the appellant in the capacity of a Manager, added that in effect, performance of the contract was delayed, the reason being that the appellant was ensuring that the terms and conditions, including those contained in clauses 24 and 25 were complied with. He went on to state that, before the termination of the contract, the appellant had commenced its execution by transporting sixteen trips of scrap materials per month.

In its defence, the respondent denied the appellant's allegation that the contract was wrongly terminated. In his evidence, DW1 who was formerly the employee of the appellant but testified for the respondent, its subsequent employer stated that, by virtue of his position with the respondent company, he had the duty of making a follow-up on the execution of the contract. In the course of doing so, he said, he found first, that the validity of the permit shown to have been issued to the appellant by the NEMC was doubtful because the same was issued on the same date on which it was applied for and secondly, that the appellant did not furnish the respondent with the requisite insurance covers from reputable companies. According to the witness, the submitted insurance covers were in the names of two individuals instead of being in the name of the appellant. Thirdly, DW1 went on to state that, the appellant did not have its own yard for storage of scrap materials, instead, it depended on the yards leased from other persons. He concluded his evidence by contending that, it was because of such non-compliances that the respondent terminated the contract.

Having considered the tendered evidence, the trial court found that the respondent had properly exercised its right under the contract to terminate it. The learned trial Judge believed the respondent's evidence that the appellant had failed to comply with clauses 24 and 25 of the

contract in that; although it had submitted insurance premiums, the same were not in USD currency but in Tanzanian shillings. He was therefore, of the view that the notice of termination served on the appellant by the respondent brought the contract to an end.

Notwithstanding the finding that the respondent had rightly terminated the contract, the trial court found that the appellant was entitled to compensation by way of general and special damages. It held that the appellant was entitled to special damages of a total of TZS 87,866,000.00 and USD 400 as compensation for the expenses it incurred in procuring the requisite facilities stipulated in the contract with a view to implement the contract. The expenses in question were in respect of the money spent in hiring and maintaining the trucks, payment for the NEMC permit, rentals for the yards, insurance covers and the money used to purchase scraps materials from the respondent. It also awarded the appellant general damages of TZS 150,000,000.00. The appellant was furthermore, awarded interest on the decretal sum and costs of the suit.

The appellant was aggrieved by the finding of the High Court that the respondent was justified **first**, to terminate the contract and **secondly**, the finding that some of the claims were not proved. It raised a total of twelve grounds of appeal. In his written submission filed in support of the appeal however, the counsel for the appellant abandoned

the 9th ground. The remaining eleven grounds may in effect, be consolidated into four grounds as follows:

1. *That the learned trial Judge erred in law and fact in holding that the appellant had breached the terms of the contract particularly clauses 24 and 25 thereof thus entitleling the respondent to terminate it.*
2. *That the learned trial Judge erred in law and fact by failing to award special damages and anticipated damages pleaded by the appellant, while the adduced evidence proved to the required standard that the same were suffered.*
3. *That the learned trial Judge erred in law and fact by deciding the issue relating to the lease by the appellant, of ex- Kauma yard while the same did not feature in the case.*
4. *That the learned trial Judge erred in law and fact in failing to determine the issue relating to the costs incurred by the appellant in leasing Usagara yard for storage purpose.*

On its part, the respondent filed a cross appeal consisting of 4 grounds that:

> *"1. The Court erred in fact and in law to award damages to the appellant under s. 37 (1) of the law of contract having found that there was no breach of Contract by the respondent.*
>
> *2. Having found that the appellant failed to prove his claim of damages against the*

respondent the court erred in law and fact by proceeding to award exorhabitant sum of general damages to the appellant.

3. *The court erred in law in awarding interest at 12 % without an agreement to that effect as required by law, and*

4. *having found that the appellant did not comply with conditions precedent stipulated in the agreement, the court erred in law by concluding that there was valid contract executed between the parties."*

At the hearing of the appeal, the appellant was represented by Mr. Mpaya Kamara, learned advocate while the respondent had the services of Mr. Faustin Malongo assisted by Ms. Caroline Kivuyo, learned advocates. As required under Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended, the learned counsel for the appellant and the respondent duly filed their respective written submissions for and against the appeal.

Submitting in support of the first ground of appeal as paraphrased above, the counsel for the appellant argued that the trial court erred in holding that the contract was wrongly terminated because the appellant had failed to comply with clauses 24 and 25 of the contract. According to

the learned counsel, the appellant complied with the conditions stipulated under the stated clauses. He went on to submit that, even if there would have been a breach, before it could terminate the contract, the respondent was required to give the appellant 14 days' notice so that it would remedy the breach. His argument was based on clause 19 (c) of the contract. It was Mr. Kamara's further submission that, the letter (exhibit P13) in which the respondent notified the appellant that the contract had been terminated, did not in terms of clause 19 (c) of the contract, amount to a valid letter of termination of contract. He stressed that, under the contract, the appellant had the right of being given a notice of 14 days within which it would remedy the breach, if any, before the respondent could exercise its right of terminating it.

With regard to the contention that the Usagara yard was not approved for storage of scrap materials, the learned counsel submitted that the respondent had denied that allegation both in PW1's statement and in the written statement of defence. He added that, whereas the appellant adduced evidence through PW1 proving that the yard was inspected and approved by the respondent's officials, the respondent did neither tender evidence to the contrary nor was PW1 cross-examined on that fact. The effect of the respondent's failure to cross–examine PW1

rendered his evidence trustworthy as the same remained unchallenged, argued Mr. Kamara. He cited the Court's decisions in the cases of **Anna Moises Chisano v. Republic**, Criminal Appeal No. 273 of 2019 and **Hatari Masharubu @ Babu Ayubu v. Republic,** Criminal Appeal No. 590 of 2017 (both unreported) to bolster his argument.

The appellant's counsel submitted also that although in exhibit P13, reference was made to clauses 15 of the contract which entitled the respondent to suspend the whole or any part of the contract for such period as it may deem fit, the letter had the effect of terminating, not suspending the contract.

In reply to the submission made in support of the first ground of appeal, Mr. Malongo opposed Mr. Kamara's argument that by virtue of the provisions of clause 19 of the contract, termination of the contract was supposed to be preceded by 14 days' notice within which the appellant would remedy the breaches, if any. According to Mr. Malongo, the requirement applied only to the conditions stated under paragraph (c) of that clause of the contract, not breaches involving theft, corruption and either illegal activity. He said further that, the respondent was entitled to terminate the contract without 14 days' notice in the case of breach of

the company's environmental policy, NEMC requirements or good environmental practices.

In this case, Mr. Malongo went on to argue, it was the use of Usagara yard, which was not approved by the respondent that constituted one of the reasons for termination of the contract. According to him, the respondent found that the use of the yard contravened the company's policy and NEMC requirement. He argued also that the appellant's failure to comply with the requirement of furnishing the insurance premiums entitled the respondent to instant termination of contract.

From the submissions of the learned counsel for the parties on the first ground of appeal, the issue which arises for our determination is whether or not by terminating the contract, the respondent properly exercised its right under the contract. The respondent's right to terminate the contract for breach of the terms and conditions thereof is provided by clause 19 of the contract under the heading **Termination for breach.** It states that:

"If at any time Buyer:

(a) Commits an act of gross negligence, wilful misconduct, fraud, or dishonesty in respect of any matter undertaken or required to be undertaken under this agreement;

(b) Acts in a manner which Company considers to be substantially prejudicial or harmful to company;

(c) Commits a breach of any other provision of this agreement and fails to remedy the breach at its own expenses and to the reasonable satisfaction of the company within 14 days of a notice by company specifying the nature of the breach, or, if the breach is not capable of remedy, fails to offer adequate compensation to company for the loss and damage suffered as a result of the breach.

(d) Breaches any of the company's site, Health and Safety, Environmental or community relations policies Company may forthwith immediately terminate this Agreement by notice in writing to buyer."

In its letter (exhibit P13), the respondent informed the appellant about termination of the contract. The relevant part of that letter reads as follows:

> *"Under clause 15, the Company is entitled to suspend the whole or any part of the scrap metals removal for such time as the Company sees fit, and the buyer is not to be entitled to any costs due to suspension by the Company.*
>
> *Following separate review following of the contract, a number of serious breaches of terms and conditions of the contract have been identified. A number of these are set out below in the attached annexure. In the view of the Company, any and each of these breaches is sufficient material to give rise to a right of termination under clause 19 of the contract.*

Accordingly, in light of the nature of these breaches, the Company hereby gives notice of termination of the contract effective immediately."

From the wording of clause 15 of the contract, we agree with Mr. Kamara that the letter exhibit P13 written to the appellant was not a notice stipulated under that clause of the contract. As clearly stated in the letter, the respondent terminated the contract with immediate effect. In doing so, it acted pre-maturely because it was required to issue to the appellant 14 days' notice with a view to allowing it to remedy the breaches, if any.

The argument by Mr. Malongo that the requirement of issuing 14 days' notice was not applicable is not, in our view, tenable. Exhibit P 13, the letter through which the respondent informed the appellant about the former's decision to terminate the contract specifies the breaches which the latter had allegedly committed. It is shown that the appellant had failed to satisfy the respondent on compliance of the conditions stipulated under clauses 24 and 25; that it failed to show that it had obtained the workers' compensation and employment liability insurance, motor vehicles insurance and equipment insurance.

Another reason was the use by the appellant, of an alternative storage; Usagara yard instead of Nyakato yard which was shown in the tender document. The respondent contended that the alternative yard

was found to be unsuitable because the appellant did not obtain a permit from NEMC for use of that facility as a scrap metal yard.

We do not, with respect, agree with the respondent's counsel that the nature of non–compliance said to have been done by the appellant entitled the respondent to immediate termination of the contract. This is because the alleged breaches do not fall under paragraphs (a) (b) and (d) of clause 19 of the contract. They fall under other provisions of the contract and are thus covered by paragraph (c) of clause 19 which, in case of their non–compliance, termination of contract must be preceded by 14 days' notice within which the appellant remedy the breach or offer adequate compensation to save the contract from being terminated.

Mr. Malongo has argued that the use by the appellant, of Usagara yard was in effect a breach of the respondent's environmental policy thus entitling it to immediate termination of the contract under clause 19 (d) of the contract. With respect, that is not correct because, even if it would have been established that the Nyakato yard was unsuitable for scrap metal storage, the site did not belong to the respondent. We do not therefore find merit in that argument.

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. Since the finding on the first ground of appeal suffices to dispose of the appeal, we find no need to canvass the other grounds.

In the event, we reverse the finding of the trial court that the respondent had rightfully terminated the contract. In that respect, we quash that decision and the subsequent orders arising therefrom. The appeal is consequently allowed to the extent that the contract subsists. The appellant shall have its costs.

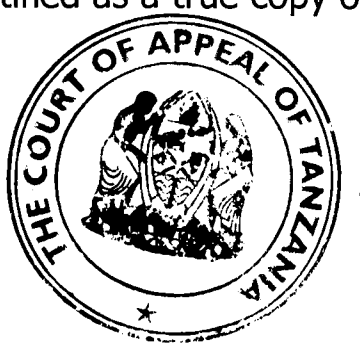
DATED at **DAR ES SALAAM** this 27th day of June, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered this 29th day of June, 2022 in the presence of Ms. Caroline Kivuyo, learned counsel for the Respondent and also holding brief of Mr. Mpaya Kamara, learned counsel for the Appellant, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL