

TANZANIA / JUDGMENT

themistocles julius caesar vs benjamini nyambikiwe stephen 2023 tzhc 23177 21 november 2023

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21 November 2023

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IN THE HIGH COURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM
CONSOLIDATED CIVIL APPEALS NO 159&184 OF 2023 (Arising from the Judgment and decree of
the Resident Magistrate Court of Dar Es Salaam at Kisutu in Civil Case No 187 of 2021 delivered on
30th day of June 2023 by Hon R. Kabate - PRM) THEMISTOCLES JULIUS
CAESER.....APPELLANT VERSUS BENJAMINI NYAMBIKIWE
STEPHEN..... RESPONDENT

JUDGMENT

2nd & 21st November 2023 CHUMA, J: It is apparent that before the Court is a consolidated appeal that is Civil Appeals No 159 and 184 both of 2023. The former was accordingly assigned to Hon Fimbo DR (with extended jurisdiction) while the latter was apportioned to. To avoid multiplicity and conflicting decisions on these two matters, the Court felt it prudent to forward the appeal file No. 159/2023 to Hon Judge in Charge for her to exercise the powers vested under Rule 11 of the Judicature and Application of Laws (Transfer and Management of Cases assigned to Magistrate with extended jurisdiction) Rules 2023 GN No 11 of 2023. And accordingly the transferred record to Resident Magistrate with Extended Jurisdiction were called upon before this court for hearing. In Civil Appeal No 184 of 2023, the appellant advanced five grounds challenging decision of the lower court in Civil Case No 187 of 2021 as follows: One, the trial Court erred in law and facts for making a decision against the appellant while time frame for performance of the contract is still subsisting, two the trial Court erred in law and fact by ordering to pay the respondent the outstanding amount while the appellant is not in breach of the contract, three that the trial court erred in law and facts by ordering the appellant to pay damages for breach of contract which in fact is still in subsistence between the parties and four the trial Court erred in law and facts by determining the matter relying on contradictory evidence and lastly the trial court erred in law and facts for deciding the case against the weight of evidence. 2 Whereas the bundle of the grievances echoed in Civil Appeal No 159 of 2023 filed by the appellant are as follows: First, that the Honourable trial Magistrate erred in law and fact in holding that the contract has been frustrated by the presence of the case at hand which has been

filed prematurely against the defendant and failed to appreciate the fact that the defendant's failure to pay monthly instalment consecutively for thirteen months defeats his intention to pay, Second that the Honourable Trial Magistrate erred in law and fact in holding that exhibit P3 was the amended agreement to vary and adjust the agreement in Exhibit PI and P2 while parties did not expressly vary or adjust PI and P2 and failed to recognize that each agreement Exhibit PI, P2 and P3 stands independent from each other and Third that the Honourable Trial Magistrate erred in law and fact when misinterpreted and misapprehended Exhibit P3. Fourth that the Honourable Trial Magistrate erred in law and fact in holding that no breach of the contract has been occasioned by either of the parties, the defendant in particular while disregarding the evidence on records that for a period of 13 months, the defendant had only paid the amount less than two months installments, Fifth that the Honourable Trial Magistrate erred in law and fact in granting the prayer not prayed for by the 3 defendant and Sixth that the Honourable Trial Magistrate erred in law and fact in holding that the judgment debtor shall pay the interest, damages and costs only if he fails to pay the principal sum within seven months from the date of judgment and failed to see that the decree is confusing. At the hearing on 1st day of November 2023, it appeared that the respondent in Civil Appeal No 184 of 2023 had lodged, a notice of preliminary objection on 31th October, 2023 containing one point of law that the appeal is hopelessly time barred. As is ordinarily the practice of the Courts, once a preliminary objection is raised, the Courts would shelve the hearing of the substantive matter to allow the disposal of the preliminary objection first. It goes without saying therefore that the Civil Appeal No 184 of 2023 had to be kept at abeyance pending the determination of the preliminary objection. The course taken by the Court was to accede to the practice in our legal fraternity founded upon prudence which has it that a Court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application or appeal before it. See the case of Shahida Abdul Hassanali Kassam Vs Mahed Mohamed Gulamali 4 Kanji Civil Application No 42 of 1999, decision of the Court of Appeal of Tanzania . Consequent upon the foregoing and prompted by the Court, for expediting the disposal of the consolidated appeals I directed Mr. Rugaibura and Mr. Galikano, learned advocates for the appellant and the respondent respectively, to argue the preliminary objection first and then address the Court on the merits of the both appeals on the same day. It was agreed that if the Court is to uphold the preliminary objection, it would then proceed to dismiss the appeal and that would be the end of Civil Appeal No 184 of 2023. However, should the said preliminary objection fail, then the Court will go ahead to consider and determine the merits of the said appeal. This in my view appear to be the trend of the court currently in order to expedite disposal of the cases. See the case of Zahara Kitindi and Another Vs Juma Salehe and 9 Others Civil Application No 9 of 2016, decision of the Court of Appeal of Tanzania (Unreported) and The Attorney General and Another Versus Dhirajilal Waiji Ladwa, Civil Application No.640/16 of 2023 (CAT-DSM) (Unreported) the decision handed down on 13.11.2023 During the hearing of the preliminary objection, Mr. Galikano contended that the appeal is time barred having contravened the provisions of the Law of Limitation Act Cap 89 2019 which provides for 90 days. He based his argument on the fact that since the decision which is subject of the appeal was delivered on 30/6/2023 and the Memorandum of Appeal was filed on 6/10/2023, the learned advocate argued that the same becomes obvious that the appeal was filed

beyond 90 days prescribed by the law. As such, the learned advocate argued that that the appeal offends the provisions of Part II Item 2 of the Law of Limitation Act Cap 89 R.E 2019 which provides for period of an appeal originated from District Court or Resident Magistrate Court that has to be filed within a period of 90 days from the date of delivery of a decision which is subject to the appeal. Mr. Galikano furthermore contended that because the Memorandum of Appeal was filed after 98 days had elapsed, hence the appeal is time barred. In the premise, the learned advocate invited the Court to dismiss the appeal with costs Arguing against the preliminary objection, Mr. Rugaibura vehemently opposed the preliminary objection. The learned advocate conceded to the open fact that the time of filing an appeal to this Court from the decision of the District Court or Court of Resident Magistrate is well couched under the provision of Law of Limitation Act which prescribes for 90 days from the date of decision subject to an appeal. However, Mr. Rugaibura was quick to state that the appeal was filed electronically on 29/9/2023 at 11: 13:59 but never processed by the Court until on 6/10/2023. He therefore argued the Court to dispense the period of filing an appeal under the provision of Rule 21 of the judicature and Application of Laws (Electronic Filing Rules) 2028 thereof and dismiss the preliminary objection. Mr. Rugaibura confessed by admitting that the Memorandum of Appeal appears to have been dated and presented for filing on 6/10/2023 due to the circumstances beyond the applicant's control. The learned advocate retaliated that the filing was concluded on 29/9/2023 hence within the time prescribed by the law save for the hard copy of the Memorandum of Appeal which was submitted in Court on 6/10/2023. In the circumstances, the learned advocate argued that the preliminary objection is unfounded hence deserves dismissal. In a brief rejoinder, Mr. Galikano submitted that the appellant is trying to shift the burden to the Court for purported failure to admit the matter in time which is not correct. The learned advocate argued that the seven days 7 beyond 90 days lapsed on 6/10/2023 from the alleged filing on 29/9/2023 which the appeal was lodged. Thus, the learned advocate argued that the appeal was filed beyond the statutory period of filing an appeal of 90 days hence deserves to be dismissed with costs. In line with the settled position stated earlier, let me dispose first the preliminary objection. I have subjected the arguments submitted by learned counsels to a proper scrutiny they deserve in order to determine one crucial issue as to whether the raised preliminary objection has merits or otherwise. As rightly submitted by both learned advocates herein, the provision of Part II item 2 of the Law of Limitation Act Cap 89 R.E 2019 require, inter alia an appeal under the Civil Procedure Code where the period of limitation is not otherwise provided for by any written law to be filed within 90 days. In this matter, there is no doubt at all first that the judgment subject of this appeal was delivered on 30/6/2023 and second the appeal was filed in court registry on 6/10/2023. If one spent considerable time counting actual days from the 1st July, 2023 a day after the judgment of the trial court was delivered and to the time appellant filed his appeal to this Court on the 6th October, 2023 as evidenced by Exchequer Receipt in the record and the 8 court's stamp on the Memorandum of Appeal will reach to a total of 98 days. The ninety days period of limitation ended on 28th September 2023. The present appeal was filed after a delay of nine days beyond the ninety days period prescribed under Part II of Item 2 of the Law of Limitation Act- In this regard the appeal was filed out of time without seeking for extension of time under the provision of Section 14 (1) of the Law of Limitation Act. At this juncture, I find it inappropriate to agree with

the reasoning adopted by Mr. Rugaibura who purported to argue that since the matter was filed electronically on 29th September 2023, the blame should be on the shoulders of the Court by its failure to register or process the appeal timely insisting that the appeal was within the time. As regard to the argument made by the learned advocate for the appellant that the appeal was filed electronically on 29th September 2023 but as I have pointed earlier that, this argument has no legs to stand considering the fact that, the exchequire receipt indicate the appeal was lodged on 6.10.2023 and not otherwise. I am aware that, the date appearing on the document after the prescribed fees has been paid is presumed as the actual date of the particular document to be filed in court. I say so because in the case of *Unita Exports Ltd Versus Customs* [1970] EA 648 where it was stated that; '...no docum ent is properly file d u n til the fees have been paid . ' See also; *Arusha International Conference Centre Versus Dr. Edward Clemens* [1989] T.L.R 154 In view of the above, having found that the appeal was filed out of time and without leave of the Court, what then should this Court do in the circumstances? This is a question which cannot detain much time and energy as the provision of Section 3 (1) of the Law of Limitation Act clearly provides that every proceedings which is instituted after the period of limitation shall be dismissed whether or not the limitation has been set up as a defence. Consequently, I am of the settled view that Civil Appeal No 184 of 2023 is hopelessly lodged out of the prescribed time. The preliminary objection is therefore sustained for having merits. Having said so, the 1st appeal (Civil Appeal No. 184 of 2023) filed herein by THEMISTOCLES JULIUS CAESAR against BENJAMIN NYAMBIKIWE STEPHEN is hereby dismissed with costs for being lodged out of time. 10 I now turn to determine the merits of Civil Appeal No 159 of 2023. In this second appeal, BENJAMIN NYAMBIKIWE STEPHEN (hereunder shall be referred as the appellant and plaintiff interchangeably) is aggrieved against the decision of the Resident Magistrates' Court of Dar es Salaam at Kisutu in Civil Case No. 187 of 2021. In that suit, BENJAMIN NYAMBIKIWE STEPHEN being the plaintiff sued THEMISTOCLES JULIUS CAESAR (being the defendant at the trial court and hereunder shall be referred as the respondent) for the following reliefs;

1. An order that the defendant has breached the agreem ent as per plaint.
2. An order fo r the defendant to pay subsistence daily allowance o f TZS 60,000/= effective from 17th April, 2019 to the date o f la st paym ent
3. An order fo r the defendant to pay the p la in tiff TZS 5,000,000/^m fflion being paym ent fo r the loss o f business and p ro fit monthly.
4. An order fo r the defendantpays interest on the aforesaid am ount in (b) and (d) a t the rate o f 12% p er month from the date when each claim accrued u ntil the date o f judgm ent or sooner payment.
5. An order that the defendantpays interest on the decretal am ount a t the rate o f 12% p er annual from the date o fjudgm ent to the date o f paym ent in full. li
6. An order fo r paym ent o f general damages as m ay be aasesed by this honourable court
7. Costs to be provided for.

8. Any other relief the court may deem just and fair to grant At the end of the suit, the trial court came up with the following decision against the defendant;
 1. Payment of TZS. 70,500,000/= Million as outstanding amount to be paid by the defendant
 2. Costs of the suit to be paid by the defendant (only if the principal amount will not be paid in 7 months from the date of the judgment)
 3. The defendant to pay interests at the rate of 12% per annum from the date of filing the suit to the date of the judgment (only if the principal amount will not be paid in 7 months from the date of judgment)
 4. Damages for the breach of contract at the tune of TZS 10,000,000/= Million (only if the principal amount will not be paid in 7 months from the date of judgment) Following the said decision which was determined in favour of the appellant (plaintiff), he however was dissatisfied against it. He has lodged the appeal with the memorandum of appeal containing six grounds of appeal. The grounds were revolving on the following. One; the trial court erred in law and in fact by holding that the contract between the parties had been frustrated by the presence of the suit filed therein which was filed prematurely against the respondent (defendant). Two; the trial court erred in law and in fact in holding that, Exhibit P3 was the amended agreement to vary and adjust the agreement in exhibit P1 and P2 while parties did not express vary or adjust exhibit P1, P2 and P3. Three; the trial court erred in law and in fact by misinterpreting and misapprehended Exhibit P3. Four; the trial court erred in law and in fact by holding that there was no breach of the contract occasioned by either parties. Five; the trial court erred in law and in fact in granting the prayer which was not prayed for by the defendant. Six; the trial court erred in law and in fact by ordering the judgment debtor to pay interest, damages and costs only if he fails to pay the principal sum within seven months from the date of judgment. When the appeal was called for hearing, Mr. Galikano and Mr. Ansbert learned Advocates appeared for the appellant in this appeal and the respondent respectively. (Civil Appeal No. 159 of 2023). Basically, Mr. Galikano in his submission in support of the appeal argued that, it was wrong for the trial court to base on exhibit P3 and ruled out the suit was prematurely instituted. According to him, Exhibit P3 was a contract entered into on 11.8.2020 in which parties agreed the payment to be made in installments within 20 months and the respondent failed to execute the payment within the prescribed time and on 26.1.2021 the appellant reminded the respondent to settle the debt. The counsel insisted that, the outstanding debt was for 20 months hence the appellant decided to institute the suit at the trial court. According to him, the suit instituted at the trial court was not premature hence the trial court decision was contrary to what was testified therein. He insisted that the respondent had breached the contract As to the 2nd and 3rd grounds of appeal which were argued jointly, Mr. Galikano was of the view that it was wrong for the subsequent agreements intended to harmonize the previous contract. Lastly, he argued that it was wrong for the trial court to rule that the interest, damages and costs be paid only upon the respondent failure to pay the principal sum within seven months from the date of the decision. In his concluding remarks he prayed the court to allow the appeal

with costs. In response, Mr. Ansbert argued that article 5 (a) of the agreement (Exhibit P.3) provides the duration of payment and when the suit was lodged at the trial court, it was still within 20 months. Hence the period of payment was not expired as per the agreement. 14 Regarding on the issue of breach of contract, he supported the trial court's findings that, there was no such a breach since the time for execution of the payment was still within 20 months as per Exhibit P.3. As to the issue of interest, costs and damages, he was of the view that since there was no breach of contract hence it was not justifiable for the respondent to be ordered to pay such reliefs. In his concluding remarks, he insisted that since there was no such breach of contract hence prayed this court to uphold the trial court finding on this account. Mr. Galikano in his brief rejoinder insisted that there was a breach of contract done by the respondent hence it was justifiable for the appellant to lodge the said civil suit at the trial court. He thus prayed the appeal be allowed with costs. Having gone through the grounds of appeal, oral submissions made by both learned Counsels and the entire court record, this court is duty bound to determine whether or not the present appeal has merit or otherwise. However, for an easy determination of the said issue, this court need to determine if at all there was a breach of contract or not. If so, then grounds of appeal No. 1, 2, 3, 4 and 5 would have no legs to stand at all. Thereafter, 15 I shall determine separately the 6th ground on whether the trial court erred in law and in fact by ordering the judgment debtor to pay interest, damages and costs only if he fails to pay the principal sum within seven months from the date of judgment. Before venturing on the merit of the issue as to whether there was a breach of contract or otherwise, this court being the first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision. This position of the law has been cemented in a number of case laws, including MAKUBI DOGANI VERSUS NGODONGO MAGANGA, CIVIL APPEAL NO 78 OF 2019 and THE REGISTERED TRUSTEES OF JOY IN THE HARVEST VERSUS HAMZA K. SUNGURA, CIVIL APPEAL NO. 149 OF 2017 (CAT-TBR) (ALL UNREPORTED) Having in mind with the above legal position and according to the court records the trial court after analyzing the evidence of both parties and exhibits tendered, (the evidence of PW1 (appellant) and DW1 (respondent) as well as the contents and weight of Exhibits P1, P2 and P3 came to the conclusion that there was no breach of the contract which has been occasioned by either of the parties the respondent in particular. At page 14, 16 15 and 16 of the typed judgement the trial Magistrate had this to say and I quote; '...it is in evidence of PW1 that, he has been undergoing several agreements with the defendant as reflected in exhibit P1, P2 and P3...this means the agreement in exhibit P A on record became invalid when the same was transformed into another agreement referred exhibit P2 on record... the said agreement exhibit P3 on record at paragraph 5.0 (B), the said amount standing outstanding at the time of TZS 78,000,000/= Million will have to be paid in 20 months counted from the date of signing the agreement and at sub-paragraph (C) of the same paragraph, the defendant was supposed to be paying TZS. 4,000,000/= Million each month for 20 months...it was not proper for the plaintiff to sue the defendant at the 13th month before the expiration of the period provided under the contract exhibit P3... with that alone, it is difficult to say and conclude that the defendant breached the agreement

exhibit P3 on record because the defendant was still within the repayment schedule when the plaintiff decided to condemn him for the breach of the same and decided to sue him prematurely. . . ' Therefore, after going through and revisited the evidence on record adduced by the parties at the trial court namely PW1, DW1 as well as the 17 contents of Exhibit P1 P2 and PW3, I find no cogent reasons to fault the findings of the trial court's findings as quoted above. I say so because, in addition to the above the existence of exhibit P1 together with subsequent agreements (Exhibit P.2 and P.3) renders this court to rule that, the terms stipulated therein in all agreements must be observed and the court is not entitled to interfere and waive in any way so long that the agreement and its respective terms was freely entered between the parties. Considering the fact that, in the instant matter neither the appellant nor the respondent had raised issue of unfree will in entering into those subsequent contracts (Exhibit P.2 and P.3), which in my view appeared to rectify the terms stipulated in the original agreement (Exhibit P.1). Therefore, this court concludes that, the subsequent contracts (Exhibit P2 and P2) were properly before the law hence the same must be enforced as agreed by the parties herein. This is a cardinal principle of the law of the contract that, it is settled law that parties are bound by the agreements they freely entered into. (See; SIMON KICHELE CHACHA VERSUS AVELINE M. KILAWA, CIVIL APPEAL NO. 160 OF 2018 (CAT-MWZ) (UNREPORTED). Therefore, even if the parties to the contract enter into subsequent agreements for the purpose of rectifying the clauses in the original agreement, still the agreement must be respected and enforced as per the wishes of the parties. This stance was also emphasized in the case of UNILIVER TANZANIA LTD VERSUS BENEDICT MKASA t/a BEMA ENTERPRISES, CIVIL APPEAL NO. 41 OF 2009 (CAT-DSM) (UNREPORTED) at page 16 the Court stated; '...strictly speaking, under our laws once parties have freely agreed on their contractual clauses, it would not have been open for the courts to change those clauses which parties have agreed between themselves. It is up to the parties concerned to renegotiate and to freely ratify clauses which parties find to be onerous. It is not the role of the courts to redraft clauses in agreements but to enforce those clauses where parties are indisputable. '[Emphasis is mine] See also; Abual Alibhai Aziz Versus Bhatia Brothers Ltd [2000] T.L.R 288 at 289 Now having in mind with the above legal position and after, re-evaluation the evidence adduced by appellant and respondent at the trial court and taken into account the weight of the substances of exhibits P1, P2, P3, with the findings of the trial court magistrate, I find no sufficient reasons to fault the findings the trial court magistrate's finding that there was no breach of contract committed by respondent in particular since as per Exhibit 19 P3 the respondent was still within the prescribed time to execute the alleged outstanding payment. In its totality, since I am satisfied that there was no breach of the contract as found by the trial court, this eventually make grounds of appeal No. 1, 2, 3, 4 and 5 filed by the appellant herein in Civil Appeal No. 159 of 2023 to have no where to stand. Consequently, I accordingly proceed to dismiss them. Turning to the six ground of appeal on whether the trial court erred in law and in fact by ordering the judgment debtor to pay interest, damages and costs only if he fails to pay the principal sum within seven months from the date of judgment. As from the plaint as quoted earlier which was filed at the trial court, the appellant had prayed for

interests, damages and costs of the suit in as far as paragraph (e), (f) and (h) of the plaint is concerned. The court record reveal further that, at the end of the trial the learned Magistrate ordered as also quoted earlier that;

1. Paym ent o f TZS. 70,500,000/= M illion as outstanding am ount to be paid by the defendant
 2. C o sts o f th e s u it to be p a id b y th e d e f e n d a n t (o n i y i f th e p r i n c i p a l a m o u n t w i l l n o t b e p a id i n 7 m o n t h s f r o m th e d a t e o f th e j u d g m e n t) 20
 3. Th e d e f e n d a n t to p a y i n t e r e s t s a t th e r a t e o f 12% p e r a n n u m f r o m th e d a t e o f f i l i n g th e s u i t t o th e d a t e o f th e j u d g m e n t (o n i y i f th e p r i n c i p a l a m o u n t w i l l n o t b e p a id i n 7 m o n t h s f r o m th e d a t e o f j u d g m e n t)
 4. D a m a g e s f o r th e b r e a c h o f c o n t r a c t a t th e t u n e o f TZS 1 0 ,0 0 0 ,0 0 0 / = M i l l i o n (o n l y i f th e p r i n c i p a l a m o u n t w i l l n o t b e p a id i n 7 m o n t h s f r o m th e d a t e o f j u d g m e n t) [Emphasis is mine] During the hearing of the appeal, the counsel for the appellant submitted that the above order was not proper since the reliefs sought and granted were supposed to be paid by the respondent. Whereas, the counsel for the respondent supported the findings of the court since there was no breach of contract hence there was no justification for imposing payment of interest therein. On my side, I am aware this court has the power to interfere and intervene the above findings of the trial Magistrate if it is satisfied among other things that the wrong principle of law was applied. See; Nance Versus British Columbia Electric Raily Co. Ltd [1951] A.C 601 at 613; Davies Versus Powell Duffryn Associated Collieries Ltd [1942] A.C 601 at 617; The Cooper Motor Corporation Versus Moshi/ 21 Arusha Occupational Health Services [1990] T.L.R 96 and M/S UNIVERSAL ELECTRONICS AND HARDWARE (T) LIMITED VERSUS STRABAG INTERNATIONAL GmbH (TANZANIA BRANCH), CIVIL APPEAL NO. 122 OF 2017 (CAT-DSM) (UNREPORTED) More so, I am also aware that whenever a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract compensation for any loss or damage caused to him thereby. This is provide under section 73 (1), (3) and (4) of the Law of Contract Act [Cap. 345 R:E 2002] Guided by the above legal positions, upon my scrutiny of the entire rival submissions from the two counsels and the entire court record, I totally agree with the stance of Mr. Ansbert, the learned counsel for the respondent. As I have said earlier that, the evidence on records in as far as the findings of grounds 1,2,3,4 and 5 are concerned, there was no breach of contract, hence at this juncture it would be inappropriate to order for the payment of the interest, damages and costs. Instead, the appellant was merely entitled to be paid the outstanding amount of money without any condition. Therefore, ground six of the appeal is then parti y allowed to the extend stated above. 22 All in all, this court orders as follows;
1. Civil Appeal No. 184 of 2023 filed by THEMISTOCLES JULIUS CAESAR against BENJAMIN NYAMBIKWE STEPHEN is hereby dismissed with costs for being lodged out of time.

2. Civil Appeal No. 159 of 2023 between BENJAMIN NYAMBIKWE STEPHEN against THEMISTOCLES JULIUS CAESAR is hereby partly allowed to the extend herein above discussed. Costs follows the event. It is so ordered. ^

■-----r W.M. CHUMA JUDGE 21st
November,2023 23

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