IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., NSEKELA, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 107 OF 2004

JAPAN INTERNATIONAL COOPERATION AGENCY (JICA) ..... APPELLANT

VERSUS

KHAKI COMPLEX LIMITED ..... RESPONDENT

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

(Dr. Bwana, J.)

dated the 31st day of March, 2004
in
Commercial Case No. 45 of 2003

JUDGMENT OF THE COURT

2 May & 21 July 2006

NSEKELA, J.A.:

The appellant, Japan International Cooperation Agency, was a tenant of the Khaki Complex Limited, the respondent, the last such tenancy relationship expired on the 31.3.2001. The appellant contended that after the expiry of this period, the parties did not enter into an agreement under which the respondent was to construct a building for leasing to the appellant, the subject matter of

this appeal. The trial court found that there was such an agreement and the appellant was in breach of the terms and conditions thereof and so condemned the appellant to pay to the respondent US$ 300,000.00 being damages for breach of contract. Aggrieved by the decision, the appellant has now lodged this appeal challenging the decision of the court below.

The appellant, through its learned advocates, filed a ten-point memorandum of appeal, namely –

1. The learned trial judge erred in law and fact in holding that there was a construction and lease agreement between the appellant and the respondent.

2. Having found that there was a construction and lease agreement between the appellant and the respondent, the learned trial judge erred in law and fact in holding that the appellant was in breach of such agreement.

3. The trial judge erred in law and fact in having found that there were delays on part of the respondent in the completion of the building

subject of the contract in holding that the appellant was in breach of the said contract when it revoked/cancelled the intention to lease the building.

4. The learned trial judge erred in law and fact in holding that the respondent's delays in completing of the premises were partly caused by the appellant.

5. The trial judge misconstrued the facts in holding that the appellant had granted extension of time to the respondent to complete the construction of the building in March 2003.

6. The learned trial judge erred in law in holding that the appellant was estopped from denying the grant of further extension to the respondent.

7. The trial judge erred in law and fact in holding that the appellant did not give a reasonable notice when it cancelled the intention to lease the building. The learned trial judge erred in fact in holding that the building was built on the specification and

designs of the appellant and that the respondent's failure to get other tenants was duel to such specification.

8. The learned trial judge erred in law in relying solely with oral evidence of the plaintiff in holding that the appellant's alleged demands for change contributed to the delays.

9. The learned trial judge erred in fact and law in assessing the quantum of damages leading to excessive damages.

10. The evidence on the record does not support the findings of the learned judge.

At the hearing of the appeal, Mr. Mujulizi, learned advocate, represented the appellant and Dr. Lamwai, learned advocate, represented the respondent.

Mr. Mujulizi submitted that the central issue for determination was whether the agreement to enter into a future tenancy agreement was enforceable in law. It was an agreement to negotiate a future agreement contingent upon the availability of premises satisfactory to the appellant. He added that the terms and conditions of the proposed agreement were uncertain and that a contract to negotiate is unknown in law, citing **Courtney & Fairbairn Ltd. v Tolaini Bros (Hotels) Ltd.** (1975) 1 All ER 716. Furthermore, the learned advocate submitted that the appellant was not in breach of the purported agreement. The parties had agreed that the premises would be ready for occupation on a specific day which passed without the handing over of the premises to the appellant. The appellants were not responsible for the delays in the completion of the building and that from the appellant's standpoint, time was of the essence since the appellants were urgently in need of the premises. Under the circumstances, the appellants were justified to terminate the purported agreement. The notice to terminate was reasonable under the circumstances.

The learned advocate disputed the evidence of PW1 and PW2 to the effect that the appellant's officials constantly made changes to exhibit P1 which was itself of doubtful authenticity. He submitted that there was no evidence as to what were the original specifications of the building. In addition DW1, DW2 and DW3 disputed the evidence on the delays but the learned judge did not explain why he disagreed with the evidence of these witnesses. As regards the assessment of damages, Mr. Mujulizi submitted that the trial judge erred in the assessment of damages. The damages were based on rent on a lease agreement which was non-existent. He questioned the propriety of the quantum of damages awarded and cited the case of **Cooper Motor Corporation Ltd. v Moshi/Arusha Occupational Services** (1990) TLR 96 at page 100 G.

Dr. Lamwai, learned advocate for the respondent submitted that there was a lawful agreement between the appellant and the respondent. This agreement was partly oral, partly by conduct and partly in writing. The cornerstone of his contention was exhibit P2, which the learned advocate called an offer from the appellant to the

respondent to construct a building. The terms and conditions of the said agreement were allegedly elaborated in paragraph 7 (b); (c); and (e) of the appellant's written statement of defence. He added that the respondent accepted the offer as indicated in exhibit 8 to the written statement of defence. Soon thereafter, he continued, the construction of the building commenced and the appellant did not deny that construction of the building was progressing. The appellant's complaint was to the effect that the agreed specifications, standards and deadlines were not met.

As regards the exhibits, Dr. Lamwai submitted that they were admitted in evidence without being so recorded. However he was of the opinion that the oral evidence adduced during the trial was enough to show that there was an offer and acceptance by conduct. He added that there was no law forbidding reliance on oral evidence. What was important was the credibility of the evidence and in the absence of documentary evidence, oral evidence was just as good. He submitted that in view of the oral evidence on the record, the appellant was estopped from denying its truthfulness.

The thrust of all the grounds of appeal is whether or not there was evidence on the record to warrant the trial court's finding that there was an agreement between the appellant and the respondent regarding the construction of the Khaki Building Complex for leasing to the appellant. This being a first appeal, the appellant is entitled to have this Court's own consideration and views of the evidence as a whole and its decision thereon. (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 itself have come to a different conclusion".

Mr. Mujulizi attacked the learned judge's conclusions on a number of fronts. As we see it however, the core argument revolves around the learned judge's treatment of the documentary evidence without such exhibits being admitted in evidence so as to form part of the record of the suit. As regards the first issue during the trial, the learned judge stated as follows –

> "My considered view is that there was a lawful agreement freely entered into by the parties and capable of being enforced. This is so because, **first,** in the discussions held between the parties and the agreement reached to construct a new block. That is uncontroverted. **Second,** is exh. D7, which confirmed the discussions and the kind of building to be constructed i.e. "with floors and facilities approved by us", the time frame and

> the future rent. **Third,** is the evidence that construction work started after exh. D7 was received, the delays and subsequent correspondence notwithstanding. **Fourth,** is the "supervision" and follow ups by DW3 with suggestions for improvements of certain things as shown in exh. P3. All the foregoing cannot be said that there was no agreement even though not written."

The reasons advanced by the learned judge in answering the first issue framed in the affirmative, could not be arrived at without a thorough analysis of the documents he referred to. Such questions as the meaning to be attributed to exhibit P2, that is whether or not it was an offer from the appellant or an invitation to treat; the question of delays and extensions thereof in the construction and completion of the building, could not be answered without the documents purportedly before the trial court. The conclusions reached by the learned judge, right or wrong, depended largely, if not wholly, on the contents of documents which were not produced

and admitted in evidence. We find the same problem when the learned judge examined the second issue. He stated as follows –

> "I have carefully considered the issues of delay, quality and rent in relation to whether either party breached the agreement. Truly there were delays in completion of the work. Various reasons are given for or against. What is of essence is that each time a deadline was not met there was communication interpartes and then one sees a subsequent complaint against the same issue. Impliedly it means that by each of the five or so deadlines, the parties reached a fresh agreement. Therefore the defendant is deemed to have agreed the extension of time by conduct."

We are constrained to repeat that the answer to the second issue framed also depended on documents which were not produced and admitted in evidence. The question is, was the learned judge

right in relying on such documents as he did? This takes us to Order XIII Rules 4 (1) and 7 (1) and (2) which is in the following terms –

> "4(1) Subject to the provisions of the next sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely –
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> (a) the number and title of the suit;
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> (b) the name of the person producing the document;
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> (c) the date on which it was produced;
>
> (d) a statement of its having been so admitted;
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> and the endorsement shall be signed or initialed by the judge or magistrate.

> 7 (1) **Every document which has been admitted in evidence,** or a copy thereof where a copy has been substituted for the original under Rule 5, **shall form part of the record of the suit.** (emphasis added)
>
> (2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them."

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 exhibits P1 and P2 were admitted in evidence. The rest of the exhibits referred to in the evidence and in the judgment were not so admitted. What then are the consequences? In India, the Patna High Court in the case of **S.M. James and another v Dr. Abdul Khair** A1R 1961 P 242 had occasion to construe Order 13 Rule 7 of the Civil procedure Code, which is in *pari materia* with our Order XIII Rule 7 (1) and (2) and stated as follows –

> "From Rule 7 above quoted, it is plain that documents admitted in evidence are the only documents that can legally be on the record; and, other documents cannot be on record of the suit. The language of Rule 7 shows that the document must be either placed on the record or returned to the person producing it. There is no alternative. Rule 7 (2) is explicit, and therefore, a document not having been admitted in evidence, cannot be treated as forming part of "the record of the suit" even though, in fact, it is found amongst the papers of the record."

There is no denying that except for exhibits P1 and P2, the remaining documents which were "baptized" as exhibits were not part of the record of the suit. This Court cannot relax the application of Order XIII Rule 7 (1) that a document which is not admitted in evidence cannot be treated as forming part of the record although it is found amongst the papers on record. The document must be either placed on the record or returned to the person producing it. 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. The inevitable conclusion is that the evidence properly before the trial court did not justify the learned judge's affirmative answers to the first and second issues before him.

We have seriously considered what course of action we should take under the circumstances. This is not a case of improper admission or rejection of evidence. The documents in question somehow were not admitted in evidence. This was a substantial error during the trial which amounted to a miscarriage of justice.

In the result, we allow the appeal and order a re-trial before another judge. Each party to bear its own costs as in this Court and the court below.

DATED at DAR ES SALAAM this 17th day of July, 2006.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

(S.M. RUMANYIKA)
DEPUTY REGISTRAR