IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 35 OF 2019

BETWEEN

ERASMUS KWAY.....PLAINTIFF

Versus

BEST SALES BUREAU

DE CHANGE LIMITED.....DEFENDANT

Last Order: 30th July, 2020

Date of Ruling: 25th Aug, 2020

JUDGMENT

FIKIRINI, J.

The plaintiff, Erasmus Kway, a natural person and businessman filed this suit against the defendant namely Best Sales Bureau de change, a legal person, seeking for a declaration that the defendant breached the contract by failing to remit USD 50,000.00 (United States Dollars Fifty Thousand only) to three different Chinese Manufacturing Companies, on behalf of the plaintiff, and that was now owing the plaintiff USD 63,000.00 (United States Dollars Sixty Three Thousand only), as specific damages for the breach of the agreement, and additionally award of interests and costs of the suit.

The plaintiff alleged by a way of purchasing order entered into the contract with three different Chinese companies in which the latter would manufacture various types of shoes for students, to be ready for the new semester of commencing in January 2015. The plaintiff made partial payment, of USD 13,000.00, distributed as follows USD 10,000, USD 2,000 and USD 1,000 to the first, second and third Chinese companies respectively.

In an endeavor to accomplish his business transaction, in 2014 the plaintiff entered into an agreement with the defendant, that the plaintiff would deposit money with the defendant and the latter on behalf of the former would make payment for the orders to the three Chinese companies upon request by the plaintiff. The plaintiff claimed he then deposited some money with the defendant for that purpose. However, the defendant for the reasons best known to her-self failed to honour the agreement by not remitting the amount of USD 50,000.00, which was delivered to her by the plaintiff for onward payment to the three Chinese manufacturing companies.

The defendant refuted the claim and testified that there was no agency agreement and arrangement between the plaintiff and the defendant; and the defendant as a company has never at any material time passed any Board Resolution authorizing its members to remit monies to Chinese companies as an agent of the plaintiff.

After the initial process including mediation which failed, at the final pre-trial conference the following issues for determination were framed:

1. Whether there was an agreement between the plaintiff and the defendant,
2. Whether there was breach of the agreement by the defendant, and
3. What relief (s) are parties entitled to

Mr. Norbert Mlwale learned counsel appeared for the plaintiff while the defendant enjoyed the legal service of Mr. Erick Kamala learned counsel. Each party summoned one witness. For the plaintiff it was PW1 - Erasmus Kway, through him most of the documents were admitted into evidence. This included exhibit P_1 collectively- which included certificate of registration for Taxpayer Identification Number (TIN) with Tanzania Revenue Authority (TRA); business license issued by Kinondoni Municipality; Intoxicating Liquor licence issued by Ubungo Municipal Council; whole sale business licence issued by Ubungo Municipal Council and hotel and conference business licence in the name of Erado Natron Hotel and Conference issued by Ubungo Municipal Council, issued to Erasmus; P_2 – receipts for the partial payment for the purchases issued by 3 different Chinese companies to the plaintiff; P_3 - the receipt dated 10th December, 2014, claimed by the plaintiff to have been issued by the defendant's staff at the Best Sales Bureau de Change to the plaintiff, after the latter depositing USD 50,000, P_4 - two cheques dated 30th June, 2015, for Tzs. 71,160,000.00 and 14, 010,000.00 totaling to Tzs 85, 170,000.00

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bearing remark refer to drawer, and with the two (2) corresponding bank slips, which were collectively admitted.

That was the plaintiff case in summary.

The defence case featured one witness, DW1 - Aloyce Kisenga Mchili, Managing Director of the Best Sales Bureau de Change. In his testimony he declined the account that the Best Sales Bureau de Change was dealing in transacting money on behalf of people. There was no document tendered in the defence case.

After the close of the case by the plaintiff and the defendant, counsels requested to be allowed to file written final submissions, the request which was granted.

Mr. Mlwale, in his submission referred to the plaintiff's testimony that the plaintiff ordered shoes from shoes manufacturing companies in China as evidenced in exhibit P_2. That in the process the plaintiff approached the defendant and paid her a total of USD 50,000.00 which the defendant was to remit to those shoes manufacturing companies in China as payment for the orders made by the plaintiff as evidenced by exhibit P_3, issued by the defendant in acknowledgment of receipt of the amount USD 50,000. To the contrary the defendant did not remit the USD 50,000 as a result the companies failed to manufacture the shoes as ordered by the plaintiff. The plaintiff demanded refund of the USD 50,000 deposited with the defendant. The defendant agreed to pay

the plaintiff by issuing him with cheques as exhibited in P_4 collectively. Both cheques were dishonoured for wants of funds in the drawer's/defendant account.

The counsel for the plaintiff further submitted that, the defendant business was to buy and sell specified foreign currencies. And in the present case there was proof that the defendant received USD 50,000 from the plaintiff in the course of his business as reflected in exhibit P_3. DW1 denied the transaction to have ever taken place but when cross examined he admitted that the transaction was carried out by one Geoffrey, the defendant's employee.

Disputing DW1's account that the defendant's day to day operations were dependant on board resolution, Mr. Mlwale submitted that, the defendant's daily operations of the business did not require board resolution, as DWI wanted this Court to believe. The Counsel also submitted that, although DW1 had denied to have received the money but exhibit P_3 was *prima facie* evidence that a total of USD 50,000.00 was received by the defendant through her employee Geoffrey.

Additionally, he submitted that, in the commercial world, agreement could be evidenced by mere commercial transaction between parties. In that regard the fact that the defendant accepted and paid the USD 50,000, though with bad cheques, in the course of her business that by itself constituted an agreement and which suffices to conclude that there was an agreement between the plaintiff and the defendant.

Submitting on the second issue on whether the defendant breached the agreement, it was his submission that USD 50,000 was delivered to the defendant so that the money could be remitted to the three shoes manufacturing companies in China for the consignment of shoes ordered by the plaintiff. However, for no good reason, the defendant failed to remit the money to the intended payees. This act was clear breach of the agreement which the defendant was duty bound to undertake. To bolster his submission, he made reference to section 37 of the Law of Contract Act, which imposes obligation on parties in respect of their promises under the agreement.

Extending his submission, Mr. Mlwale submitted that, failure of the defendant to remit the money to the three shoes manufacturing companies in China amounted to fundamental breach of the agreement. To strengthen his position, he cited the case **the Tanganyika Farmers Association Limited v Njake Oil Company Limited, Civil Appeal No. 40 of 2005, at P 16,** where the Court of Appeal in addressing on breach of contract had this to say:

> *"On the contrary, for the reason stated, and for the undisputed fact that the appellant terminated the contract without the requisite three months notice, we agree with learned trial Judge that it was the appellant which breached the contract."*

On reliefs, it was the plaintiff's submission that, since the defendant breached the contract by failing to remit the money amounting to USD 50,000.00 therefore deserved reliefs as provided in section 73 (1) and 74 (1) of the Law of Contract. And since there was a payment already made as proved by exhibit P_2, the plaintiff is also justified to claim for payment of USD 13,000.00. Apart from the specified amounts the plaintiff is as well warranted to be paid for the loss of business as a result of breach of agreement by the defendant, plus general damages incurred since 2014.

The defendant's final submissions were to the effect that, there was no agency agreement or arrangement to remit USD 50,000.00 to the Chinese companies between the plaintiff and the defendant. PW1 might have entered into agreement with three Chinese companies by a way of purchase order to purchase shoes and paid USD 13,000.00 in advance, the transaction which did not involve the defendant. After all the purchase order did not indicate full purchase price rather it showed amount paid in advance to the three different Chinese companies. The defendant was surprised how the purchase order was regarded as the agreement while it did not provide the purchase price of the said goods. The defendant was not privy to an arrangement between plaintiff and the Chinese companies

Mr. Kamala in his submission made a reference in **Black Law dictionary 9th edition at page 1354,** which defined purchase order as:

"A document authorizing seller to deliver goods with payment to be made later, also the said purchase order issued by the buyer to a seller indicating types, quantities and agreed prices for product or service."

He went on submitting that, the essence of purchase order was to show the goods ordered and their price, so if one looked at plaintiff's purchase order will see that the plaintiff ordered goods worth USD 13,000 and not USD 63,000 as the purchase order did not show the claimed amount. On the other hand, he submitted that the plaintiff failed to provide any evidence that he paid an advanced of USD 13,000 as no receipt was produced. Likewise, there was no purchase order to prove that he ordered shoes worth USD 50,000. The plaintiff's testimony was thus mere words which had no evidential value, argued the counsel.

Submitting on agency evidence led, Mr. Kamala submitted that, no concrete evidence was adduced to substantiate the claim. The plaintiff failed to inform the Court on the terms and conditions of the agreement between the plaintiff and the defendant. More so, PW1 testimony was contradictory because in one breath PW1 stated that he agreed with DW1 to act as his agent to effect the payment to the three Chinese companies and on the same breath PW1 testified that he agreed with the defendant to act as his agent to effect payments to the Chinese

companies and in the same breath PW1 testified that be agreed with the defendant to honour the same.

Submitting on exhibit P_3, Mr. Kamala submitted that, PW1 testified that P_3 was a valid receipt and was issued by the defendant and it contained defendant's seal, however when cross-examined on why the date on the receipt and on the seal differed, the plaintiff stated that, the difference was a typing error. The said receipt is dated 10th December, 2014 while the seal was dated 10th November, 2011, whereas PW1's witness statement and plaint indicated that he delivered the said monies in September, 2014.

Examining the receipt closely, Mr. Kamala submitted that, when PW1 was cross-examined as to why DW1 did not sign on the receipt, and why the plaintiff signature on the receipt Kway. E. was different from other signature signed on other documents, such as in the plaint, in witness statements, in the purchase order and pay in slip which was signed as E. Kway, PW1 answered that by stating that he has two signatures. As for the issuance of the controverted receipt to DW1, PW1 stated that, he never issued the receipt or received monies from the plaintiff. This thus indicates that the receipt which was admitted as exhibit P_3 and relied on by the plaintiff has been fabricated and was for the purpose of misleading the Court. It was then Mr. Kamala's further submission that the said receipt was not signed by DW1 rather it contained the defendant employee's name and if one looked at the receipt closely one will note that it was written

and signed by one and the same person. Maintaining there being no relationship between the defendant and the Best Microfinance Solution Limited, as these were two separate entities and the two cheques were signed by unauthorized person, and more so PW1 in his testimony had stated that he did not know the person who signed the cheques.

On the strength of his submission, Mr. Kamala pressed the Court to determine first of all the existence of the contract and then the terms thereof. The burden of proof regarding the existence and the terms of the contract rested on a party relying on the said contract as provided under section 110 (1) of the Evidence Act, Cap 6 R.E 2019 (the Evidence Act).

The defendant also submitted that section 2 (1) (e) of the Contract Act, has defined what is an agreement. In this case there was no agency agreement or any arrangement as asserted by the plaintiff and exhibits P_3 and P_4 which were contradictory and thus cannot be used as mode of agreement between the parties. Even for the oral contract to be valid there must be consideration. According to the defendant's counsel, in PW1's evidence there was no evidence for the consideration between parties for the remittance of USD 50,000.00 to the Chinese companies. There was as well no proof that there was an agency agreement, and if the answer was yes, what was the commission for remitting the said monies. Supporting his position, he cited the case of **Thomas v Thomas (1842) 2QB 851,** whereby consideration was defined as, something which is of

some value in the eyes of law. This was further stated in **Dunlop Pneumatic Tyre Co. Ltd v Self–fridge Ltd (1915) A.C 847,** that consideration is a price for which the promise is brought. The **Black Law Dictionary 9th Ed, at P.347** as well defined, consideration as something bargained for and received by a promisor from the promise; that which motivates a person to do something, so a person who parts with value must be given value in return hence this means nothing should go for nothing. Section 25 of the law of the Law of Contract Act similarly, provided for the term consideration. According to the provision an agreement made without consideration is void and therefore there was no agreement between the plaintiff and the defendant.

Submitting on the second issue, it was Mr. Kamala submission that, the defendant did not breach any agreement as no agreement existed so as to be able to be breached by any of the parties.

On the last issue on reliefs, the plaintiff was praying for the payment of USD 63,000. 00 as special damages, it was the defendant's submission that, since the plaintiff has failed to bring evidence that he was entitled to the claimed amount as special damages which must be specifically pleaded and proved, then nothing can be claimed. To buttress his position, he cited the case of **Cooper Motors v Moshi Arusha Occupational Health Serviced (1990) T.L.R 96.** This was further stated in the case of **Mohammedy Shomari v Principal Secretary,**

Minister of Defence and National Service and 2 Others, Civil Case No. 37 of 2009, High Court (Commercial Division) when it was held that:

> *"Plaintiff must discharge burden of proof in support of the relief claimed also he must adduce evidence to establish the existence of agreement."*

It was the defendant's further submission that, PW1 stated that he gave the defendant USD 50,000 to remit to 3 Chinese companies, yet in his plaint he claimed USD 63,000 from the defendant as the specific damages. However neither the claim of USD 50,000.00 nor that of USD 63,000.00 was proved by the plaintiff that they had an agreement with the defendant to remit the said monies to the three Chinese companies.

Concluding his submission, Mr. Kamala submitted that, the defendant dealt with the business of buying and exchanging currencies only, the assertion which PW1 acknowledged during cross examination. This was also what DW1 stated in his witness statement, that his business dealt in exchanging currencies on spot transaction and not otherwise. Referring to Rule 16 (1) of the Foreign Exchange (Bureau De Change) Regulation of 2008, which illustrated that Bureau De Change shall not engage in transaction other than spot transaction. Anything contrary to spot transaction done by any bureau de change was against the law and illegal. Mr. Kamala was thus surprised how did the plaintiff come about with such claim, that he agreed with the defendant to remit the said monies

while the law prohibits such kind of transaction. On that aspect he thus submitted that the plaintiff was not entitled to any relief and proceeded to urge the Court to dismiss the suit with costs because the plaintiff's allegations against the defendant were irrelevant, unjustifiable and have no legs to stand in the eyes of law.

In determining as to whether the plaintiff has proved his case albeit on the balance of probabilities, the three framed and agreed issues, will be answered as they appear.

The first issue is whether there was an agreement between the plaintiff and the defendant.

Without any doubt, the answer is no, from the available evidence including exhibits P_1, P_2, P_3 and P_4 there was no any agreement between the plaintiff and the defendant. The evidence led was simply assumption and just hearsay without any legal basis. Before the Court no evidence was tendered to prove that, there was either agency agreement between the plaintiff and the defendant or any commercial arrangement between the two. The only document which the plaintiff relied upon to prove the agreement between the plaintiff and the defendant is exhibit P_3 a receipt dated 10th December, 2014 for the amount of USD 50,000.00 alleged issued by the defendant's employee to the plaintiff. Close scrutiny of the said receipt, this Court finds the receipt was lacking and could not prove that there was any commercial or business arrangement between

the plaintiff and the defendant: **one,** the receipt featured contradictory dates. While the date on the receipt indicated 10th December, 2014, the date on the seal showed 10th November, 2011 which is completely different from the date indicated in PW1's witness statement and plaint where it was indicated that the said monies were delivered in September, 2014. There was no reasonable explanation given as to why the dates differed. In the absence of any explanation, exhibit P_3 proved to likely being a forged document. Court cannot base its findings on mere allegation and fabricated evidence.

Two, exhibit P_3 as argued by the counsel, I also find the exhibit lacking. The receipt seemed to have been written and signed by one and the same person. I, candidly asked myself, how possible was it for someone to tender USD 50,000.00 and yet not be issued with a document that was not properly signed and stamped by the person who received such huge amount of money? **Three,** although the stamp on the receipt indicated to be that of the defendant but that alone is not conclusive proof that the said document was prepared by the defendant. Moreover, the receipt just contained one name of "Geoffrey" alleged to be the defendant's employee, but whose identity is unknown to the defendant's company, as submitted by DW1.

Even though the burden of proof is on the balance of probabilities in civil cases, the burden nonetheless lies with the plaintiff. Section 110 of the Evidence Act, has clearly stated that:

110(1) *"Whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which be asserts must prove those facts exist"*

110(2) "When a person is bound to prove, the existence of any fact, it is said the burden of proof lies on that person."

In the case of **Jeremy Woods & Another v Robert Choundry & Another [2008]1 E.A 147** following the dictates of the above section it was held that:

"since the law of evidence demands that, he who alleges should prove, it was incumbent for the defendant to prove the fact."

Furthermore, under section 25 (1) of the Law of Contract, any agreement made without consideration is void. I, thus agree with Mr. Kamala that there was no consideration which is a price for the promise, agreed between the parties. Whereas it is not disputed that, the defendant is a legal entity dealing in the business of buying and exchanging currencies, the business which strictly prohibits dealing with other than spot transaction, but also the plaintiff has nevertheless failed to prove that he transacted with the defendant. Rule 16 (1) of the Foreign Exchange (Bureau de Change) Regulation, 2008 provides that:

"A bureau de change ***shall not engage in transaction other than spot transactions."*** [Emphasis mine]

To this end, even if there was an agreement between the plaintiff and the defendant, that the latter shall be an agent of the plaintiff, still that would have been non-compliance to the regulation in place. Such contract would by any standard amounted to illegal contract because it is strictly prohibited by the law to engage in any transaction other than spot transaction. In the case of **DFCU Bank Ltd v Kasozi [2003]2 E.A 414,** It was held that:

> *"Whether or not the contract is tainted with illegality is a question of facts."*

This was further stated in the case of **Nathalal Raghavji Lakhani v H.J Vaitha and Another (1965) 1 E.A 452,** where it was held that:

> *"The **plaintiff cannot seek relief** on the ground of **the illegality** of his own conduct"*

In the light of the above provisions, it is therefore expected of the plaintiff who the law wants to prove whether there was an agreement between the plaintiff and the defendant, to fulfill that obligation, of which he has failed to adduce sufficient evidence in relation to his claim.

The second issue is whether there was breach of the agreement by the defendant.

Before the Court, PW1 testified that, the defendant received USD 50,000.00, from the plaintiff which was to be remitted to the three shoes manufacturing

companies in China as payment for the consignment of shoes already ordered by the plaintiff, the transaction which was allegedly not carried out, which fits to be clear breach of agreement but unfortunately the plaintiff has failed to prove that he delivered USD 50,000.00 to the defendant for the alleged purposes. As pointed out when dealing with the first issue, essentially there was no proof at all furnished to this Court showing that there was an existing agreement between the plaintiff and the defendant.

Even in the absence of the agreement, still the transaction would have been illegal voiding which could have been an agreement, as such transactions are prohibited by law. Therefore, since the plaintiff failed to prove the existence of any agreement between him and the defendant, I, totally agree with Mr. Kamala, that, the defendant did not breach any agreement as no agreement existed which was able to be breached by any of the parties.

The last issue is what relief (s) parties are entitled to, the plaintiff is claiming for USD 63,000 as specific damages. It is trite law that specific damages have to be specifically pleaded and proved. **See: Augustino v Anicet Mugabe [1992] T.L.R 137 and Masole Gerneral Agencies v African Inland Church Tanzania [1994] T.L.R 192,** in which the Court of Appeal of Tanzania in **Masole** case (supra) held that:

> *"Once a claim for specific item is made,* ***that claim must be strictly proved,*** *else* ***there would be no difference***

between specific claim and general one. *The trial judge rightly dismissed the claim for loss of profit because it was not proved."*[Emphasis mine]

The plaintiff in his pleadings pleaded for USD 63,000 as special damages and prayed for it to be paid. In his evidence, PW1 has testified that, the defendant breached the agreement by failing to remit the money amounting to USD 50,000 to the three shoes manufacturing companies in China and instead of returning the monies the defendant retained it. Although the amount was pleaded albeit with differing amount, but still, he failed to prove any of the stated amounts. The exhibit P_3 a receipt relied on by the plaintiff was not credible as it had varied, confusing and contradicting information and therefore could not be considered favourably by the Court as trustworthy evidence in assisting the plaintiff to prove his case. This relief is declined.

The plaintiff is also praying for general damages to be assessed by the Court. Despite claiming for this relief, the plaintiff though in his witness statement stated that he suffered general damages, but failed to explain the kind of general damages he suffered. Since there was no evidence to prove that the defendant was tasked to remit the said amount, it would have been difficult to fathom the general damages claimed. On top of that the claim would have been based on illegal transaction as the defendant is strictly prohibited by the law to engage in any other transaction other than spot transaction namely bureau de change where

the transactions on foreign currency takes place. In the case of **Tanzania Saruji Corporation v African Marble Company Ltd [2004] T.L.R 155,** the Court of Appeal held that:

> *"General damages are such as the law will presume to be the direct, natural or probable consequences of the act complained of: the defendant wrong doing must therefore have been a cause, if not the sole or particularly significant, cause of damage."*

On the balance of probabilities, the plaintiff has completely failed to prove his claim. The plaintiff apart from failing to prove the existence of agreement and breach of the agreement has also failed to prove the losses which the plaintiff claimed to have incurred and alleged damages claimed to have suffered which were directly caused by the breach of the alleged contract.

In the light of the above, the plaintiff case is dismissed with cost. It is so ordered.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

P.S FIKIRINI

JUDGE

25th AUGUST, 2020