IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 171 OF 2009

HERMANUS PHILLIPUS STEYN …..…..……..…….…… APPELLANT

AND

GIOVANNI GNECCHI RUSCONE ……..…….....……..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Waweru, J) dated 7th September, 2007

in

H.C.C.C. NO. 5972 OF 1993)

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JUDGMENT OF THE COURT

By a plaint dated 17th December, 1993, ***Giovanni Gnecchi Ruscone***, an economist, and the respondent in this appeal, made a liquidated demand of a total sum of US$3,690,097.22 being commission for services rendered to ***Hermanus Phillipus Steyn***, the appellant, allegedly at his request sometime between 1991 and 1993. The appellant denied the claim and upon trial, Waweru J, in a reserved considered judgment delivered on *7th September, 2007*, found for the respondent. The appellant was aggrieved and hence this appeal.

The background facts are as follows; The appellant was one of the shareholders and directors of companies which had vast assets within the United Republic of Tanzania, which included agricultural land. Between 1981 and 1982. All those assets, including the personal and family assets of the appellant were nationalized by the government of Tanzania which at the same time ordered the deportation of the appellant. The government thereafter enacted the Companies (Acquisition and Management) Act, No 20 of 1983, to legalize those actions. It then meant that the appellant could not return to Tanzania to seek any redress. By the aforesaid Act, a party affected by the nationalization would be entitled to fair and full compensation for the resultant loss. For over ten years the appellant could not successfully pursue compensation on behalf of his companies and his family for the assets which had been seized by the Tanzania government.

By an agreement dated *26th July, 1991*, the appellant appointed the respondent as his agent or

representative to negotiate on his behalf with officials of the Tanzanian government on the issue of compensation for the loss of the aforesaid assets. The agreement was as follows:

"I, Herman Steyn hereby nominate Mr G. Guecchi – Ruscone as my sole representative to negotiate on my behalf with the Tanzanian Authorities a mutually agreeable settlement to the dispute over compensation for the properties nationalized in January 1982 and known generally as Rift Valley Seed Ltd. This agreement is valid only to the end of September 1991 by which time an agreement between myself and the Tanzanian Authorities must be signed.

Date 26-7-91

Sign.

It is further agreed that if you should be successful in your efforts you shall receive a success fee of 3% of the actual money received by me.

Sign."

Although the above quoted is referred to as an agreement, from a legal stand point it was an offer made to the respondent because on *7th October, 1991*, the respondent appears to us to have made a counter offer to the appellant extending the period to the end of January 1992. The appellant accepted that offer in a letter addressed to him dated *7th October, 1991*; by endorsing his approval.

The respondent made contacts with several government officials in Tanzania and exchanged correspondence on the matter with them. By *30th January, 1992*, which was about the end of the term of the agency, no agreement had been reached between the appellant and the Tanzanian government. The respondent appreciated this and also that he would not be entitled to any commission, because by his letter to the appellant dated *30th January, 1992*, he requested for the extension of the period of his mandate. As material, the letter read as follows:

"Mr Herman P Steyn

P O Box 44924

Nairobi, Kenya

Dear Herman,

With reference to our agreement dated 26th July, 1991, and subsequent letter of the 7th October, 1991, in which I confirmed my agreement to assist you to negotiate a satisfactory settlement in your dispute with the Government of Tanzania over the compensation for your nationalized assets, I wish to confirm my agreement to extend the period of my mandate until the matter has been satisfactorily concluded. ...

Please sign and return to me copy of this letter in agreement.

Yours sincerely

Sign

Giovanni Gucchi Ruscone

Signed in agreement.

Sign

Herman Steyn."

As is clear from the letter the mandate was extended for an indefinite period. By his letter dated *4th September, 1992,* addressed to Mr Paul M Rupia, Principal Secretary, President's Office, State House P O box 9120, Dar-es-Salaam, the appellant acknowledges that the respondent had made efforts to negotiate a settlement on his behalf with the Tanzanian Authorities, and by that letter he set out the background to his claim and the main issues which had been identified. Eventually it was agreed that there was a need for a joint valuation by valuers appointed by the appellant with those of the government of Tanzania, of all the assets for which compensation was sought. That was done and on *11th February, 1993*, the sum payable to the appellant was agreed at a total of US$12,226,052.45 on terms that:

"HP Steyn is prepared to accept such offer subject to:

(a) The above amount to be net of all taxes.

(b) The return of the arms, Hangar, Arusha and Dar houses.

(c) Be allowed to take over the aircrafts and drilling equips as is where basis.

(d) Firearms and personal effects be repossed (sic). If they are not there or damaged beyond repair, valuation done by Holmes plus the same rate of interest should apply."

Those terms were accepted by the appellant and the Tanzanian authorities. An agreement was executed to that effect, a copy of which is part of the record of appeal.

Following the signing of that agreement, the respondent drafted a letter dated *13th February, 1993,* for the appellant's signature which as material reads as follows:

"Dear Giovanni,

, Herman P Steyn, in my personal capacity, as representative of all the shareholders and as legal representative of the above mentioned companies, hereby confirm to you, in accordance with the agreement reached between ourselves on 26th July, 1991 and subsequent extensions of your mandate, that having reached an acceptable agreement with the Government of Tanzania on the matter of compensation also thanks to your assistance over the last year and a half, you shall be paid the sum of US$1,300,000 (US$ one million three hundred thousand) or 10% of the total agreed settlement (inclusive of the value of any asset that is to be returned to me or other shareholders), whichever, is the largest payable in US$ as first disbursement of any compensation amount by the Tanzania government."

The draft letter did not go well with the appellant. He addressed a handwritten protest note in reply, which as material reads as follows:

"I have just read the letter you had written and handed to me this evening to sign with utter dismay. When it became clear that you were quite unable to initiate any negotiations with the Tanzanian Government, I took over that role myself but kept you informed of the progress in light of the talking relationship we had established. Now upon perceiving a shocking mischievous intent in the letter you want me to sign, you draw me to spell out the situation clearly. You no longer have any mandate to contact, discuss or negotiate with the Government of Tanzania in any way whatsoever on our behalf.

It is probably superfluous to add how deeply disappointed I am by your attitude."

The letter bears the date *15th February, 1993*, four days after the appellant had signed an agreement on compensation with the Tanzania government. Several other letters were exchanged and it would appear to us that the parties did not arrive at any settlement regarding the issue of commission payable, if at all, to the respondent. Eventually this suit was filed.

The appellant was duly served with summons to enter appearance and the plaint, he appeared and filed a written statement of defence in which he denied not only that the respondent facilitated the signing of the agreement between him and the Tanzanian government, but also that the respondent dealt with that government at all regarding the matter.

Waweru J, in a considered judgment identified three issues upon which a decision of the respondent's case depended. These were:

"(i) What were the terms of the agreement between the parties dated 26th July, 1991? What were the rights and obligations of the parties under that agreement?

(ii) Was the settlement agreement between the defendant and the government of Tanzania as a result of the effort of the plaintiff? Was that agreement procured by the plaintiff's effort and influence?

(iii) Has the defendant been paid by the government of Tanzania under the settlement agreement and if so, to what extent?"

On the first issue, the learned Judge found as fact that the respondent was mandated to be the appellant's representative in negotiations for the recovery of his nationalized properties or for appropriate compensation for their loss. He was required to procure an amicable settlement in that regard on terms acceptable to the appellant for an agreed commission of 10% of any sums that the appellant would be paid pursuant to that settlement. The settlement was to be reached within a specified period, namely, before the end of *September 1991*. However, as we stated earlier the period within which a settlement would be procured was varied to be *"until the matter has been satisfactorily concluded."*

It was common ground that the terms aforesaid were mutually agreed. What was not agreed upon is whether the commission would extend to the properties recovered in specie. The trial judge considered the issue and held that commission would only be confined to payments made in monetary terms. In this appeal no issue arose from that holding.

Regarding the second issue the trial judge's determination of this issue as also the other issues depended on credibility of witnesses. The trial judge considered the respective evidence of the respondent, the appellant and the respective witnesses they called on their behalf. He believed the respondent that he made contacts with high ranking government officials in the Tanzanian Government, highlighted the plight of the appellant to them, and persuaded them to enter into negotiations with him as a representative of the appellant. He believed the respondent that he was able to secure temporary entry permits into Tanzania for the appellant, because in the course of negotiations the personal presence of the appellant was needed.

The trial judge also considered the respective testimony of the respondent's witnesses, all of them former officials of the Tanzania Government and believed their testimony, with the result that on the basis of that testimony he came to the conclusion, on a balance of probabilities, that the settlement agreement dated *8th November, 1993*, which was executed between the appellant and the Government of Tanzania was as a result of the effort and influence of the respondent.

Regarding the third and last issue, the learned judge found as fact that the respondent did not adduce any documentary evidence to show that the appellant had been paid by the Government of Tanzania pursuant to their mutual agreement dated *8th November, 1993*. It was however, his view that evidence of payment was a matter especially within the knowledge of both the appellant and the Tanzania government. The learned judge considered the letters exchanged between the appellant and the Government of Tanzania, and he was unable to find any in which the appellant was complaining of non-payment of the money agreed between the parties to be due and owing from the Government of Tanzania and the appellant. Relying on that and other evidence the learned judge concluded that the appellant had been fully or substantially paid by the Government of Tanzania under the settlement agreement. Consequently he held that the respondent was entitled to his commission of 10% of US

$1,206 015/52 or its equivalent in Kenya shillings. The US $1,206,015/52, was the monetary part of the settlement agreement. The learned judge also awarded interest on the sums he found to be due to be computed from the date of the suit at court rates until payment in full. The learned judge also awarded costs of the suit to the respondent. The appellant was aggrieved and hence this appeal.

There are two broad issues in this appeal, both of them based on findings of fact. Firstly, the appellant complains that the trial judge erred in finding that it was through the respondent's effort that an agreement as to payment was reached between the government of Tanzania and the appellant. Secondly, that the learned judge erred in fact in holding that the appellant had been paid by the government of Tanzania pursuant to the said agreement.

Before we deal with these two issues there was one issue which was raised by Mr. Michuki for the appellant with regard to the nature of the respondent's claim. It was his submission that the respondent's claim was for damages of a special nature which by rules of procedure has to be proved strictly. Mr. Nagpal, for the respondent did not think the respondent's was a claim for special damages. The phrase "*Special Damages*" is not defined in the Civil Procedure Act and Rules made thereunder . In ***RATCLIFFE V. EVANS*** ***[1892] 2 QB D.524 at 528***, Bowen L.J. defined the phrase in the following terms:

"At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be super added to the general damages which the law implies in every breach of contract and every infringement of an absolute right.… Special damages in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

The respondent's claim was based on contract. The contract between the appellant and the respondent was for the performance of a specific assignment at an agreed fee. The respondent's claim was for that fee and accruing interest, and no more. It was a claim based on contract and for a contractual sum. The claim was liquidated but not in the nature of special damages. The trial judge in his judgment appears to have confused a liquidated claim and special damages. The two are not the same. The respondent's claim was neither special nor liquidated damages. It was a claim for services rendered, not for any particular damage. ***HASSAN V. HUNT*** ***[1964] EA 201*** attempts to explain the distinction between special damages and liquidated damages. As stated earlier the respondent's claim was neither of those, and in our judgment nothing turns on submissions made by Mr. Michuki on the manner the respondent's claim was pleaded or proved. The respondent was required to call evidence to show a contract existed between him and the appellant, the specific terms of that contract, and in the event of breach how much was due to him arising from that breach.

Regarding whether or not the respondent performed his part of the bargain, it is important to consider the evidence on record. This is a first appeal. We remind ourselves that it is our duty to look at the entire evidence which was presented before the trial court, re-evaluate it and draw our own conclusions from it without overlooking the conclusions of the trial court on the issues (see ***SELLE V. ASSOCIATED MOTOR BOAT CO. LTD*** ***[1968] EA 123***).

By his letter to the appellant dated *30th January, 1992*, the respondent penned that he had made substantial advances in his negotiations with officials of the Government of Tanzania. He asked the appellant to confirm by signing a copy of the letter and return it to him which the appellant did. Subsequently, one G.E. Maganga addressed a letter to the appellant, dated *4th March 1992*, and in that letter he stated, in pertinent part, as follows:

"RE: IN THE MATTER OF COMPENSATION TO THE FORMER SHAREHOLDERS OF THE COMPANIES ACQUIRED UNDER THE SPECIFIED COMPANIES (ACQUISITIONN AND TRANSFER OF MANAGEMENT) Act No. 20 of 1983.

As a follow-up to the meeting your representative had with the undersigned we write to inform you that both parties have agreed in principle for our valuers (i.e. the Government Chief Valuer and your Valuer) to meet sometime in the last week of March 1992 (i.e., 25th March) to discuss on valuation techniques applied/ to be applied in finalizing the exercise. …"

It would appear to us that as at the date of the aforesaid letter negotiations were concluded, and what was outstanding was the ascertainment of the actual sums payable to the appellant. The negotiations were between officials of the Government of Tanzania and a representative of the appellant. The representative, we opine, was the respondent as the appellant did not state that he had instructed any other person to enter into negotiations with the Tanzanian Government on his behalf. We observe that even as late as *25th November, 1992*, officials of the Government of Tanzania were dealing with the respondent. In a letter of that date Mr. G.E. Maganga, wrote to the respondent, as material, as follows:

*"**RE: RIFT VALLEY SEED CO. LTD***

Please refer to your recent discussion with Mr. Peter Ngumbullu, Principal Secretary to Treasury here in Dar-es-Saam regarding compensation payable to Mr. H.P. Steyn on the above cited company's assets which were acquired by Government in 1983.

… We would thus propose that our meeting with you be programmed for the week starting 30th November, 1992. We will communicate to you the specific date after our 27th November, meeting.

Yours sincerely.

(G.E. Maganga)

For PRINCIPAL SECRETARY."

And on *11th January 1993*, the respondent addressed a letter to Mr. Peter J. Ngumbullu on the same subject which he concluded as follows:

"It is the desire of Mr. Steyn to reach a definitive settlement of this issue as soon as possible so as to clear the way for possible future investments. I would therefore be grateful if you could use best offices to finalize the necessary consultations and advise me on the dates when we may resume our meetings and finalize this matter. …"

The appellant's case before the superior court was that the respondent failed to procure an agreements with the result that he had to be personally involved in negotiations. It was his contention that the agreement which was finally reached was as a result of his own efforts. We earlier indicated that the agreement between the parties was reached on *11th February, 1993* on a protem basis. It was executed by G.E. Maganga for the Treasury of the Government of Tanzania and the appellant. It was said to be valid for fourteen days from that date.

A final agreement was executed on *8th November, 1993*, but there was no significant variation of its terms. The total monetary compensation was ***US$12,060, 155.23*** reduced from ***US$12,226,052.45***.

Disagreements set in between the appellant and the respondent after the agreement of *11th February, 1993*. Up to that date the appellant was a prohibited immigrant in Tanzania. The last clause in that agreement is clear on the matter. It reads thus:-

"For expediency of the exercise, Government agree to lift the P.I. Status on the day of signing the compensation agreement."

It follows that up to *11th February, 1993*, the appellant could not have possibly been negotiating directly with Government officials. Accordingly, we are of the view that the appellant's complaint has no

basis.

The first broad ground we framed earlier has no basis.

Regarding the issue of payment, we agree with the trial Judge that the appellant indeed may have received some payment from the Tanzanian government. The appellant signed an agreement as to payment with the Tanzanian government on or about 11th February, 1993. The sums payable were agreed at US$12,060,155.23 conditional on the appellant surrendering designated items. The appellant by his letter replying the respondent's letter dated *13th February, 1993*, took credit for the settlement amount. He accused the respondent of having failed to initiate any negotiations with the Tanzanian government.

And yet for some unknown reason, whatever correspondence relating to the matter he addressed to Tanzanian government officials, he copied the same to the respondent. This is what he stated, in pertinent part, in the aforesaid letter:-

"I took over that role myself (of negotiation with the Tanzanian Government) but kept you informed of the progress in light of the talking relationship we had established."

It is our view that the appellant was copying the letters to the respondent because he recognized and appreciated the role the respondent was playing in negotiating a settlement for him with the Tanzanian government. It was after the settlement that the relationship between the appellant and the respondent became sour. Whether or not the appellant has been paid is neither here nor there. A settlement had been reached between him and the Tanzanian government with the assistance of the respondent for payment to him of a specific sum of money. Compilation of any sums due to the respondent would be based on the agreed sum. That is what the respondent advised the appellant he should do, by his letter to the appellant dated *13th February, 1993*. We have no basis at all for faulting the trial Judge on this issue. Payment was a matter especially within the knowledge of the appellant and the Tanzanian Government authorities. By dint of the provisions of ***section 112*** of the Evidence Act, Cap 80 Laws of Kenya the onus was on the appellant to show how much he had so far received and if not why no payment had been made after the agreement he reached with the Tanzanian Government had been signed. He did not offer any explanation in that regard. Moreover, according to Gabinus Edgar Maganga (PW3), the appellant indicated to him that he did not want the respondent to know what had been agreed upon regarding the settlement. This is what he said:

"When the memorandum … was signed the plaintiff was not present. Mr. Steyn, after the signing told me not to disclose the memorandum to the plaintiff. It surprised me because all along the plaintiff had been Mr. Steyn's representative in the discussion."

He was not contradicted on this. On the basis of that evidence it is clear that the appellant evinced the intention of not meeting his part of the bargain as soon as the mutual agreement was reached and a memorandum thereof was signed. He should not be allowed to benefit from his own breach.

In the foregoing circumstances, this appeal lacks any merit.

Accordingly it is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 22nd day of October 2010.

S.E.O. BOSIRE

……..……

JUDGE OF APPEAL

P.N. WAKI

……..…..……..

JUDGE OF APPEAL

D.K.S. AGANYANYA

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR