IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., ORIYO, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 41 OF 2009

UNIVELER TANZANIA LTD ..... APPELLANT

VERSUS

BENEDICT MKASA trading AS
BEMA ENTERPRISES ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Werema, J.)

Dated the 30th day of January, 2009

In

Commercial Case No. 25 of 2007

JUDGMENT OF THE COURT

1st & 9th March, 2016

JUMA, J.A.:

This appeal arises from judgment and decree of the Commercial Division of the High Court at Dar es Salaam (Werema, J.) made on 30th January, 2009. The appellant, Unilever Tanzania Limited, filed the Commercial Case No. 25 of 2007 to claim a sum of Tshs. 122,316,459.00 owing from the respondent, Benedict Mkasa who trades under the name *BEMA Enterprises*. The sum claimed in the suit plus interests thereon, was

for the goods the appellant supplied and delivered to the respondent up to 31st January, 2007.

The background to the dispute traces back to a distribution agreement by which the appellant appointed the respondent as its key distributor. The respondent was as a result agreed to distribute goods produced by the Unilever Tanzania to several retail shops, wholesale shops and supermarkets in designated zones in Dar es Salaam and Bagamoyo. Once the goods reached the designated outlets, it was the appellant who recommended the sale prices at those outlets. In his role as the "key distributor", the respondent was required to keep all the customers fully stocked with goods at all times.

To ensure that the respondent received regular supplies of goods for purposes of distribution, the appellant operated a system described as "generator-system" which required the respondent to input the record of its sales on a weekly basis. Once the respondent records the input in the generator system, the appellant would immediately forward new supplies to the respondent to replenish the sold out goods. As consideration, the

respondent/key distributor was entitled to a commission set at 5.5% of the value of the products. This commission was deductible on the invoice.

During the hearing of the suit, Mr. Joseph Mutashobya the General Manager of the appellant was the only witness who was brought by the appellant to support of the claim against the respondent. He testified on how the cheques sent out by the respondent were dishonoured by the bank. And how, in violation of their agreement, the respondent failed to pay for the goods which the appellant had supplied. The respondent Benedict Mkasa testified in person and conceded that he and the appellant, had on 23rd November 2003 entered into a distribution agreement. He however complained that the agreed commission of 5.5% was insufficient to sustain his agency in the distribution agreement. He blamed the rising operation costs caused by rising fuel prices, repairs, maintenance and slow pace of sales of certain products. These costs ebbed away his commission to unsustainable levels. The respondent relied on the evidence of a consultant, Ephraim George Msoma (DW2) who had been engaged by the respondent to study the operation of his distribution agency. DW2 found the product distribution costs incurred by the respondent to distribute the

appellant's products were higher than the agreed commission. On the basis of the report which DW2 prepared, the respondent asked the appellant to increase the commission from 5.5 to 7.5%.

In his determination of the suit, Massati, J. (as he then was) identified the following four issues which later guided Werema, J. who took over the hearing of the suit to its determination:-

(1) Whether the Plaintiff supplied various merchandise to the Defendant for sale in the month of January, 2007?

(2) Whether the Defendant paid for the said supplies?

(3) Whether the Plaintiff's refusal to review the commission payable to the Defendant is justified? If so, whether the said refusal amount to repudiation of the contract?

(4) To what reliefs are the parties entitled?

In his final decision, the learned trial judge relied on the report of the consultant (DW2) to subject the appellant's suit claim of Tshs.

122,316,459.00 to the commission of 7.5% instead of 5.5% under the agreement by stating that:-

> *"For those invoices where a rate of 5.5% was used, the plaintiff (appellant) should top up the difference between 7.5% and 5.5%. Any residue if any in the principal amount claimed from the defendant should be paid to the plaintiff."*

Being aggrieved with the judgment and decree of the High Court as set out in the Notice of Appeal, the appellant has come to this Court armed with four grounds of appeal:-

> *1. The Learned Judge erred in law in entering judgment for the Defendant/Respondent in the absence of any counter-claim, evidence or prayer to that effect.*
>
> *2. The Learned Judge erred in fact and in law in dismissing the Plaintiff's/Appellant's suit.*

3. The Learned Judge erred in fact and in law in relying on the testimony of DW2 which is contradictory, uncorroborated and shaky.

4. The Learned Judge erred in fact and in law in admitting and relying on exhibit "D.2".}

When this appeal was called for hearing on 1st March, 2016, Mr. Bethwel Peter learned Advocate appeared for the appellant, while Mr. Cornelius Kariwa learned Advocate appeared for the respondent. In his oral submissions, Mr. Peter informed us that he will combine the first and second grounds of appeal to contend that the trial judge erred in law for not only dismissing the appellant's suit but also for entering the judgment in favour of the respondent without the latter presenting any counterclaim, evidence or prayer to justify that award. He also intimated that he will combine his submissions on the third and fourth grounds of appeal by faulting the trial judge for relying on contradictory evidence of DW2 and exhibit D2 which this witness exhibited as evidence.

Submitting in support of the first two grounds, Mr. Peter referred us back to the Plaint and Written Statement of Defence where the appellant made a specific prayer for the respondent to pay a sum Tshs. 122,316,459.00 together with interests and the respondent was mainly contesting the refusal of the appellant to review the commission from 5.5% to 7.5%. According to the learned counsel, the way the trial Judge answered the three main issues on the basis of evidence before him, is opposed to the way he later reached his final decision. On the first issue under which the trial court sought to establish whether the appellant supplied various goods to the respondent for sale, the learned trial judge answered in affirmative on page 220: *"...I am therefore satisfied that various merchandise products were supplied by the plaintiff to the defendant for distribution for sale."*

Mr. Peter next referred us to the following issue left for trial court's determination, as to whether the respondent paid the appellant for the supplies of goods he received from the appellant; the answer is in the negative, implying that the respondent is yet to meet his payment obligations to the appellant. The learned counsel submitted that having

found the first and second issues the way he did, the trial judge should not have refused to grant the prayers which the appellant disclosed in its plaint.

In so far as the third issue was concerned, Mr. Peter submitted to us that the learned trial judge found to be undisputed the evidence that the respondent had refused to pay because he was questioning the commission of 5.5% and preferred a commission of 7.5%. Mr. Peter referred us to page 223 of the judgment of the trial court where the trial judge concluded that the respondent was bound by the agreement which the two sides had earlier executed from 1/1/2005 and: "*...The relationship of the parties here was governed by a Distribution Agreement. The agreement contains provisions relating to the mode of ending the agreement ...Refusal to review a commission is not one of the reasons for terminating the contract....*" Having answered the three issues in favour of the appellant, the learned counsel submitted that the learned trial judge should not have dismissed the appellant's prayers and award the respondent the relief of the commission of 7.5% which the respondent did not pray for nor was it supported by evidence on the record.

Mr. Peter in his submissions on third and fourth grounds of appeal questioned the weight which the trial judge attached on the evidence of Ephraim George Msoma (DW2) and his report (exhibit D2). He attacked the evidence of DW2 and the report he exhibited on several fronts. First, he referred us to the evidence of DW2 where he concedes that it was the respondent who employed him to prepare the "Distributors Profitability Analysis" report. Secondly, he referred to the evidence on record where DW2 admits that the respondent was both his friend and a neighbour. He insisted that the trial court should not have relied on this report of DW2 which prepared to favour his friend. In his third line of attack, Mr. Peter questioned the authenticity of the report tendered as a photocopy because even DW2 himself had conceded that it was neither dated, nor did he sign it to link him as the author who executed the document. In so far the appellant's advocate is concerned, exhibit D2 does not even qualify to be considered as a secondary evidence of the document which DW2 authored.

Counsel for the appellant urged the Court to allow the appeal, and set aside the judgment of the High Court and grant the appellant his prayers in the plaint.

In reply, it was Mr. Kariwa's submission that the conclusions of the trial court were all based four issues which the parties left for the trial court's determination. The issue of the commission of 5.5% was subject of the third and fourth issues which parties led evidence on and the trial court made its own decision on the same. Contending that the appellant has no good cause for complaining, the learned counsel referred us to the evidence of DW2 which he believes laid the basis for the raising of the commission in favour of the respondent.

Mr. Kariwa invited us to reject the suggestion that because the respondent and Mr. Msoma (DW2) were friends and lived as neighbours, the report this professional prepared would necessarily be designed to favour his friend. The learned counsel urged us to take into account the educational, professional background and wide experience of this witness. Mr. Kariwa pointed out that DW2 is a holder of a Master's Degree in Business Administration and a Business Consultant capable of giving an expert opinion.

On behalf of the respondent, Mr. Kariwa did not see any other evidence capable of lowering the evidential weight of the consultant's

report (exhibit D2). He submitted that the appellant was accorded the opportunity to cross examine DW2 and the report which this witness exhibited. According to the learned counsel, the appellant should have similarly presented an expert witness documents to support the commission charged under the distribution agreement. Having failed to take up that opportunity, the appellant has not advanced any valid ground for this Court to interfere with the decision of the trial Judge who found the agreement to be unconscionable.

In his rejoinder, Mr. Peter submitted that the way DW2 was solely engaged outside the framework of the distribution agreement cannot rule out the dangers of bias in the recommendations on the commissions. He submitted that both parties to the agreement should have had a hand in procuring an expert to advise them.

From their respective submissions the two learned counsel are on common ground that the learned trial judge found to his satisfaction that per the products distribution agreement, the appellant had indeed supplied the goods as claimed in the plaint. The learned two counsel are also in

total agreement that Werema, J. similarly found that the respondent had failed to remit payments to the appellant for the goods that had been supplied. The central issue outstanding for our determination in this appeal is whether the learned trial judge was entitled as Mr. Kariwa believes he was, to rely on the consultant report which DW2 prepared (Exhibit D2) as a basis to raise the commission. The relevant portion of the judgment of the High Court which precipitated the variation of the contractual commission states:

> *"...The defendant has all along complained that the rate of the commission at 5.5% was low. He proposed a rate of 7.5% as a break even rate. The plaintiff did not show that the rate was unreasonable or not. But I have studied* ***EXH D2,*** *which I am satisfied was prepared independently and realized that assuming by using the rate of 5.5%, the paid amount as commission was Shs. 10,689,514 while the operating cost remains fixed at Shs. 12,075,881/=, then if the rate is raised to 7.5% the commission amount will be at Shillings 14,576,660. That is a difference of shillings 3,887,096/=.*

Assuming that operating costs will remain constant, the amount is well above the operating costs. I am of the view this will provide the defendant a fair return on his investment. This is the rate, in the absence of consensus of the parties for any other rate, which I think should be used by the plaintiff to remunerate the defendant as a commission. For those invoices where a rate of 5.5% was used, the plaintiff should top up the difference between 7.5% and 5.5%. Any residue if any in the principal amount claimed from the defendant should be paid to the plaintiff."

We think on re-evaluation of the evidence of the agreement between the parties which was tendered as exhibit P7, Mr. Bethwel Peter is entitled to complain about the way the trial judge placed reliance on the consultant's report to upgrade the commission from the aggregate of 5.5% to 7.5% contrary to the clear terms of the agreement. We think, any variation of the commission must be mutually agreed. It was therefore a misapprehension of evidence for the trial judge to conclude that the

consultant report (Exhibit D2) which DW2 prepared at the behest of the respondent outside the framework of the agreement between the two parties, was sufficiently "independent" to objectively guide the variation of the commission of 5.5% specified under the distribution agreement.

The clauses governing commission in the distribution agreement must be taken to have intended what the clauses actually state. Under paragraph 4 of the agreement (exhibit P7), the following provision is made to govern commissions:

> *"**Commissions***
>
> *In consideration for acting as Key Distributor, for and on behalf of the company, and in agreement with the conditions stipulated above,* ***Unilever Tanzania Limited will pay you a commission, which is currently an aggregate of 5.5% on the value of the products. This will be paid directly to you as a deduction on invoice.*** *The* ***company retains the sole discretion to review this commission from time to time****.*

The commission has been structured to cover all and every reasonable expense to be incurred in performance of the redistribution effort and give you a reasonable return on the investment." [Emphasis added].

With such a resolute clause of the agreement giving the appellant sole discretion to review the commission of 5.5%, we do not think even the third and fourth issues which the parties left for the trial court's determination, entitled the trial Judge to interfere with the agreed rate of the commission. It is crystal clear from above excerpt of the agreement that the respondent had freely bound himself to the clause giving the appellant ***sole discretion to review this commission from time to time***. This clause of the agreement must be taken to have spelt out the parties intentions as to which between them can review the commission. There is no room left for the trial High Court to vary this express intention of the parties. So, when on 1st January 2005 Mr. E. Kwasi Okoh the Managing Director of the appellant, and, Mr. Benedict Mkasa, the Key

Distributor signed the agreement, the parties became bound by the terms and clauses in that agreement.

Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves. It was up to the parties concerned to renegotiate and to freely rectify clauses which parties find to be onerous. It is not the role of the courts to re-draft clauses in agreements but to enforce those clauses where parties are in dispute.

This position we have taken was echoed in a persuasive decision which the Supreme Court of Nigeria took on 2nd day of March 2007 in **Osun State Government vs. Dalami Nigeria Limited**, SC. 277/2002 (http://www.nigeria-law.org/) it was stated that the law in Nigeria is settled law on the proposition that the parties are bound by the agreements they freely entered into. No party would therefore be permitted to go outside that agreement for remedy. For the purpose of the instant appeal before us, it means that the rights of the appellant and the respondent herein are strictly limited to what is provided for in the agreement (exhibit P7) between these disputing parties and nothing more!

In the upshot, we allow this appeal and set aside the judgment of the High Court. We hereby order the respondent to comply with the terms of the product distribution agreement and pay the appellant the sum of Tshs. 122,316,459 being the amount due as on 31st January, 2007. Costs shall abide the outcome of appeal.

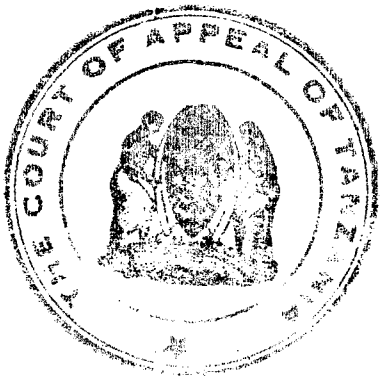
DATED at **DAR ES SALAAM** this 3rd day of March, 2016.

N.P.KIMARO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL