IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 13 OF 2015

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And NDIKA, J.A.)

SCANIA TANZANIA LTD ..... APPELLANT
VERSUS
1. AFRO STAR (T) LTD
2. MAX KIRITA MINJA ..... RESPONDENTS
[Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Makaramba, J.)

dated the 29th day of August, 2014
in
Commercial Case No. 126 of 2012
.....

JUDGMENT OF THE COURT

25th October, & 16th November, 2017
MBAROUK, J.A.:

The appellant, SCANIA TANZANIA LTD, earlier on filed a suit in the High Court of Tanzania (Commercial Division), Commercial Case No. 126 of 2012 against the respondents jointly and severally for the recovery of USD.37,289.06 being the unpaid and/or outstanding amount of the purchase of one Scania truck with registration No. T 842 ATH and its trailer No. T 307 ATD respectively which the 1st respondent bought from the appellant on

credit. On the other hand, the respondents filed their counter claim/set off amounting to USD 35,600 being money paid as VAT.

Briefly stated, the facts leading to this case are that, the appellant, which is a limited liability Company, has among its objects the business of importation and sale of Scania vehicles and spare parts and offers related working services. The 1st respondent, AFRO STAR (T) Ltd, is a limited liability Company dealing with the transportation of goods, approached the appellant for the purchase of Scania truck with its trailer, the subject of this case. The 2nd respondent, MAX KIRITA MINJA, is a businessman based in Dar es Salaam and is the Managing Director of the 1st respondent Company, Afro Star (T) Ltd.

The appellant's case on the record of appeal is that, the 2nd respondent approached the appellant for the purchase of a Scania truck and a trailer. The parties agreed that, 70% of the purchase price was to be paid by Stanbic Bank (the financier) and the remaining 30% was to be paid by the 1st respondent. The 1st respondent is registered with the Tanzania Investment Bank and enjoys incentives including exemption from paying VAT.

The condition of the loan was to the effect that the Bank (the financier) was to be registered as a co-owner of the said vehicle together with the 1st respondent. However, the Bank (Stanbic Bank) did not enjoy the incentives enjoyed by the 1st respondent, hence she had no exemption on VAT.

The record shows that, the 2nd respondent who was the Managing Director of the 1st respondent issued a Promissory Note in the sum of USD 38,319.50 in favour of the appellant in order to take care of the payments. The 1st respondent also issued to the appellant a postdated cheque in the sum of USD 38,319.50 payable on or after 5th July, 2008, but later on the payment of the cheque was stopped by the 1st respondent's company. The Promissory Note expired and as on the date when the suit was filed before the High Court, the 2nd respondent had not fully settled his obligations. That means, the respondents had not reimbursed the appellant the amount of USD 37,289.06.

On the other hand, the respondent denied the claim and by way of counter claim they claimed from the appellant the sum of USD 35,600.00 being monies paid as VAT by the respondent's financier (Stanbic Bank Ltd.) to the appellant. This was because the respondents claimed that the said

vehicle was cleared by the appellant free of tax while they are paying to their financier with interest to date.

After full hearing, the High Court (Hon. Makaramba,J.) dismissed the appellant's suit with costs and entered judgement in favour of the respondent's counter claim with costs.

Aggrieved by the decision of the High Court, the appellant has preferred this appeal armed with the following grounds of appeal, namely:-

1. ***THAT,*** *the learned trial Judge grossly misdirected himself in fact and in law in failing to draw a distinction between payment of VAT on importation of a motor vehicle and payment of VAT on registration of the vehicle.*
2. ***THAT,*** *the learned trial Judge, having called MWANTUMU SALIM as a Court witness, grossly misdirected himself in restricting the parties to put question to her to clarify the issue that was before the Court.*

3. ***THAT,*** *having regard to the undisputed fact that imported truck was registered in the joint names of the respondent who enjoyed exemption and the Bank which did not enjoy exemption, the learned trial Judge grossly misdirected himself in failing to hold that VAT had to be paid.*

4. ***THAT,*** *having regard to the circumstances of the case, evidence on record and the conduct of the respondents the learned trial Judge grossly misdirected himself in allowing the counter claim.*

In this appeal, Mr. Richard Rweyongeza, learned advocate appeared for the appellant, whereas Mr. Ludovick Nickson, learned counsel, appeared for the respondents.

At the hearing, Mr. Rweyongeza opted to argue the appeal generally and adopted his written submissions filed earlier on in terms of Rule 106(1) and (2) of Tanzania Court of Appeal Rules, 2009. He submitted that, in dealing with this appeal it has to be known that there are main actors in this case, namely, the appellant (the seller) the 1st respondent (the buyer), the 2nd respondent (the purchaser), Stanbic Bank (the financier) and TRA. He

further submitted that, each among those actors had its role. He said the purchase of the vehicle was partly financed by the 1st respondent and Stanbic Bank (the financier), whereas TRA comes into play as there is a payment of VAT in the transaction of purchasing the said motor vehicle.

Mr. Rweyongeza added that, this case arose after a Promissory Note (Exhibit P.1) was issued by the 2nd respondent to pay the appellant USD 38,319.50 and deposited USD 7.663.90 to settle the purchase price of the vehicle. He said, at paragraph 16 of the 2nd respondent's Written Statement of Defence found at page 54 of the record of appeal, reasons for not paying the debt were given. Mr. Rweyongeza maintained that, as the debt was there, hence the respondents should have paid it. He said, the findings of the trial Judge that the respondents were not indebted to the appellant has no justification, and should not have made a finding against the pleadings and the evidence by just looking at the exhibits.

In expounding his argument Mr. Rweyongeza submitted that, it is in evidence by the appellant that the 1st respondent did not pay the 30% and as a result, the 2nd respondent issued a Promissory Note of USD 38,319.50 dated 1st February, 2008 (Exhibit P.1) in favour of the appellant. He contended that, the Promissory Note was payable on or by 5th July, 2008

and on the same date on which it was due, the 1st respondent issued a cheque (Exhibit P.2) of the same amount, but it was dishonoured by the Bank.

Mr. Rweyongeza stressed us that, through that Promissory Note issued by the 2nd respondent, there is no dispute that the respondents were indebted to the appellant as per their joint Written Statement of Defence at paragraph 11, where they pleaded that they had exercised a right of set off against the amount in VAT which they claim was not paid but misappropriated by the appellant. He urged us to find that the 1st respondent never paid the 30% value of the motor vehicle.

Mr. Rweyongeza further submitted that, the respondents were all out to hide the truth even in their pleadings after coming up with a defence of set off in their counter claim by claiming the whole amount of VAT. He wondered and failed to see as to how the defence of set off could work when the respondents still claim the whole amount.

As to the issue as to how much are the respondents indebted, Mr. Rweyongeza submitted that the respondents have come up with the issue of set off. In his clarification, Mr. Rweyongeza submitted that, there is no

dispute that the appellant did issue a Tax Invoice to the 1st respondent's Bankers (Exhibit P3) and the accompanying statement as found at pages 242 and 243 – 255 respectively of the record of appeal. He submitted that, the Tax Invoice was raised in December, 2007 and the return was duly filed on 28/1/2008 showing payment of 42,384,000 equivalent to USD 35,600 the sum reflected in the tax invoice. He said, this is the sum claimed by the respondents as the appellant had not paid VAT instead they appropriated the sum as it appears at paragraph 3 of the respondent's counter-claim. Mr. Rweyongeza added that, the unchallenged evidence on record from that allegation shows that the appellant paid the money to TRA, hence that cannot be a sound reason for claiming the money by way of counter-claim. He further submitted that, the appellant gave reasons as to why VAT was paid and pointed out that the Bank insisted that it be registered as one of the co-owners of the vehicle and with that registration the VAT exemption did not apply because it included registration of the Bank which is not exempted under the TIC.

Having realized the problem of payment of VAT, when a vehicle is registered under the circumstances demanded by the Bank, Mr. Rweyongeza said, it was for that reason, the trial Judge decided to call a witness from the

office of the Commissioner General *Suo motu* as a court witness. However, Mr. Rweyongeza added that, the said court witness MWAJUMA SALIM who came to assist the trial High Court on the issue of co-ownership as the reason behind the payment of VAT, did not sufficiently help the court, instead she left the issue unresolved. Therefore, he submitted that, the court did not have enough material upon which to base its finding that the respondents were not liable to pay VAT.

On the issue as to whether the respondents were entitled to the payment of VAT, Mr. Rweyongeza submitted that, the learned trial Judge gave the following reasons as shown at page 235 of the record of appeal:-

1. *The Bank paid the purchase price with VAT inclusive.*
2. *The vehicle was imported free of Taxes and duties.*
3. *The Tax Invoice was raised by mistake.*
4. *The Bank is recovering interest from the 1st respondent.*

However, Mr. Rweyongeza submitted that, in arriving at that conclusion, the learned trial Judge failed to consider the following:-

1. *The unanswered question that there was a requirement by the Bank to be registered as a Co-owner and that demand required payment of VAT on registration.*
2. *That fact that the mistake if any, was not caused by the appellant but it was for the interest of the parties.*
3. *The fact that the 1st respondent who is said to be paying interest to the VAT took long time beyond the statutory period to approach the appellant improving an assistance for these fund from TRA.*
4. *The fact that under the circumstances the appellant never committed any wrong against the respondents.*
5. ***The undisputed fact that the respondents have never disputed the fact that they have paid the 30% of the purchase price and***

that is why the 2nd respondents gave a Promissory Note and they wanted a set off.

6. *The unfounded allegation by the respondent that the appellant misappropriated the VAT collected from the respondents through Stanbic Bank.*

Mr. Rweyongeza then urged us to find that, had the learned trial Judge considered the pleadings and the evidence on the record as a whole, he could not have made a finding in favour of the respondents as he did. Lastly, he prayed for the appeal to be allowed with costs.

On his part, Mr. Nickson, the learned advocate for the respondents vehemently opposed the appeal and prayed to adopt his written submissions. He started by submitting that, the agreement of a sale of the vehicle between the respondents and the appellant was that the 30% of the sale price was to be effected by the respondents and 70% was to be paid by Stanbic Bank Ltd. (the financier of the respondents) as per the loan agreement entered between the Financier and the respondents. Mr. Nickson maintained that, Stanbic Bank Ltd as the financier of the respondents paid the said 70% of the purchase price and through the evidence of the letter from the appellant to Stanbic Bank Ltd dated 19th December, 2007 (Exhibit D1) it has shown

that the respondents had paid all the reminder (i.e. 30% of the purchase price) to the appellant and what remained was the balance to be paid by Stanbic Bank Ltd. For that reason he submitted that, the respondents are not indebted to the appellant at the tune of USD 37,289.06 or any amount, because the said letter written by the appellant estops him from denying having been paid the initial deposit of 30% of the purchase price. In support of that contention, he cited to us Section 123 of the Evidence Act. He further submitted that on the issue of Promissory Note claimed to have not been paid, the same has no legs to stand on, because after the cheque was dishonoured, the respondent paid the balance to the appellant and that is why the appellant wrote a letter to the respondents' financier that the respondents had paid the initial deposit and what remained was the 70% of the purchase price from the financier.

As regards the issue whether the 1st respondent was exempted from paying VAT and if paid who had the duty to claim a refund from TRA, this issue gave rise to the counter claim made by the respondents. The learned advocate for the respondents submitted that, the evidence shows that the appellant issued an invoice to Stanbic Bank Ltd. for the purchase of the motor vehicle which included VAT at USD 35,600.00 while they knew that the

respondents had a certificate of incentives which exempted them from paying taxes. He further contended that the appellant admitted to have received the said amount, hence the trial court correctly awarded the respondents as per their counter claim as they were entitled to the payment of USD 35,600.00.

Having examined the rival submissions from both sides in this appeal, we have found that the appeal can conveniently be resolved by considering the following issues which arose from the grounds of appeal:-

1. *Whether the respondents were indebted to the appellant to the tune of USD 37,289.06.*
2. *Whether the learned trial Judge grossly misdirected himself in restricting the parties to put questions to a witness called by the court called Mwantumu Salim to clarify the issue which was before the Court.*
3. *Whether the learned trial Judge misdirected himself in failing to hold that VAT had to be paid on the purchase of the imported truck which was registered in joint names of the respondent who*

enjoyed exemption ***and*** *the Stanbic Bank Ltd.*

which did not enjoy exemption.

As regards the 1st issue, the facts on record show that after the agreement of sale of the truck and a trailer was entered, the appellant issued a Tax Invoice - Exhibit P3 on 6th December, 2007 which included VAT to the tune of USD 213,600.00 and thereafter wrote a letter dated 19th December, 2007 – Exhibit D1 to Stanbic Bank Ltd (the financier of the respondents) concerning the balance of the total amount payable, that is USD 168,800.00. In that said letter, the appellant acknowledged to have received the required deposit amount for the said truck and the arrangement fee.

In essence the respondents, immensely relied on that letter Exhibit D1 to convince the trial court to decide in their favour. However, looking at the same letter Exhibit D1, the appellant required the Financier, Stanbic Bank to credit the balance of USD 168,800.00 to the appellant's account. That means the amount was yet to be received by the appellant and that is why later on the respondents issued a Promissory Note – Exhibit P1 on 1st day of February, 2008 and later a postdated cheque for payment on dated 5th July, 2008 - Exhibit P2 of USD 38,319.50 which was stopped by the 1st respondent. We are of the view that, as there was no concrete evidence that payment was

made to the appellant after the postdated cheque was dishonoured, the trial Judge erred when he found that the respondents had established that they were no longer indebted to the appellant. We are increasingly of the view that, looking at the sequence of events as reflected on the record, it clearly shows that, the respondents did not pay the appellant the amount of USD.37,280.60. Hence, the 1st issues is answered in the affirmative.

As regards the 2nd issue, as to whether the trial Judge misdirected himself in restricting the parties to put questions to the court witness to clarify the issue which was before the court, we are of the view that even if she appeared as a court witness, but the parties had a right to put questions to her so as to clarify the issue before the court. We are further of the view that, the trial Judge was supposed to follow the applicable procedure in our courts of allowing each party in a case to put questions to a witness before the court. However, for reasons which will be apparent herein the misdirection on the part of the trial Judge does not effect in the determination of this appeal.

As regards the 3rd issue, we are of the considered opinion that, the finding of the learned trial Judge to the effect that the purchase price for the imported Scania truck did not include VAT was problematic due to the fact

that he failed to analyse the situation in depth. This is because, the evidence on record shows that there existed a joint ownership between Stanbic Bank (the financier) which did not enjoy Tax exemption and the 1st respondent. We are of the view that if there was no joint ownership between Stanbic Bank and the 1st respondent, the 1st respondent could have enjoyed the Tax exemption of his own. It is undisputed that, according to the Tax Invoice – Exhibit D1 issued by the appellant it has been clearly shown that the amount payable included VAT to the tune of USD 35,600. It is in evidence also that the return made by Tanzania Revenue Authority for the month of December, 2007 found at page 243 – 255 especially at page 255, the appellant paid VAT to the tune of Tshs. 42,364,000/- equivalent to USD 35,600 to TRA as reflected in the TAX Invoice.

For the above stated reasons, we are of the considered opinion that as there is sufficient evidence that the appellant paid VAT to the TRA to the tune of USD 35,600 and taking into account that there was no Tax exemption, we find that the trial Judge misdirected himself in failing to hold that VAT had to be paid. In any case, even if VAT was not payable by the respondents, since the amount was paid to TRA, the same would have been recovered from that authority, not the appellant.

The appeal by the appellant is hereby allowed. The award on the counter claim by the respondent is reversed. The appellant is entitled to payment of USD. 37,289.06 with interest as prayed in the plaint with costs.

DATED at **DAR ES SALAAM** this 8th day of November, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

C.M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL