

**IN THE COURT OF APPEAL OF TANZANIA  
AT MBEYA**

**(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)**

**CIVIL APPEAL NO. 94 OF 2018**

**CITY COFFEE LTD .....APPELLANT**

**VERSUS**

**THE REGISTERED TRUSTEE OF ILOLO COFFEE GROUP .....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania, at Mbeya)**

**(Levira, J.)**

**Dated the 21<sup>st</sup> day of April, 2017**

**in**

**Civil Case No. 9 of 2012**

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**JUDGMENT OF THE COURT**

**23<sup>rd</sup> October & 1<sup>st</sup> November, 2019**

**MWAMBEGELE, J.A.:**

The appellant lost a suit in the High Court in which he was sued by the respondent for Tshs. 486,786,952/= being the value of 120,251 kilograms of coffee delivered and sold to her but not paid for and general damages. After a full hearing during which the appellant featured one witness and tendered exhibits and the respondent fielded three witnesses and also tendered exhibits, the trial court awarded the respondent Tshs. 451,955,700/=, 21 % interest per annum thereon from the date of filing the suit and Tshs. 4,000,000/= general damages as well as costs of the

suit. Aggrieved, the appellant has come to the Court with three grounds of grievance; namely:

- "1. That the Honourable Judge erred both in law and facts in her judgment for condemning the appellant to pay for the coffee which was not supplied and delivered by the respondent to the appellant;*
- 2. That the Honourable Judge erred both in law and facts in her judgment for ordering the payment which was not proved by the respondent; and*
- 3. That the Honourable Judge erred both in law and facts in her judgment for not considering the strong evidence of the appellant."*

When the appeal was placed before us for hearing on 23.10.2019, both parties were represented. While Mr. Thomas Massawe, learned advocate, appeared for the appellant, Mr. Victor Mkumbe, also learned advocate, entered appearance for the respondent. Both learned counsel had earlier on lodged their respective written submissions and reply written submissions for and against the appeal which they sought to adopt as part of their oral submissions. Both learned counsel exercised their right to clarify them pursuant to rule 106 (11) of the Tanzania Court of Appeal

Rules, 2009 – GN No. 368 of 2009 (the Rules) as amended by the Tanzania Court of Appeal (Amendment) Rules, 2019 – GN No. 344 of 2019.

In the written submissions in support of the application, the appellant submits that in the entire proceedings, the respondent did not testify as to when she supplied, how many kilograms and who received the said consignment of coffee. In order to prove the allegations, she submits, the respondent ought to have submitted documents acknowledging delivery which are called Delivery Notes which cover the details on the quantity, weight, parties who delivered and at the same time the document called Parchment Tally/Receipt Note which shows who received the coffee and the quantity thereof. Failure to produce the Parchment Tally/Receipt Note for the entire consignment means that the respondent did not prove the allegation, she argues. She added that the appellant, through Mariam Samwel Shila (DW1), produced Exh. D1 showing all documents for the coffee delivered by the respondent and not otherwise.

With respect to the second ground of appeal, which is somehow connected with the first, the appellant submits that the High Court ordered the appellant to pay the respondent the sum of Tshs. 451,955,700/= for

the coffee which was never supplied. It is submitted that the Court shifted the burden proof onto the appellant to prove that the said coffee was not supplied. It was incumbent upon the respondent to prove on which documents they were issued together with the warehouse receipts when they delivered the said coffee, the appellant's counsel submits.

With respect to the third ground, the appellant submits that the court did not give much weight to the evidence of the defence witness who was the one who participated in the entire process from receipt of the coffee to keeping them in the warehouse and testified that she received 62775 kilograms of coffee and issued appropriate Parchment Tally/Receipts Note which is the reason why the appellant did not dispute. As rightly testified by DW1, the respondent did not prove delivery of 120,251 kilograms of coffee to the appellant, he submitted.

Having stated as above, the appellant's counsel prayed that the appeal be allowed and the decision of the High Court be reversed.

On his part, the respondent's advocate, in his reply submissions, submits that the appellant relies on purely hearsay evidence to support his appeal and gave the following reasons to support his argument. **First**, the

respondent tendered thirteen Warehouse Receipts which were admitted collectively as Exh. P1 as appearing at p. 96 through to p. 108 of the record of appeal. The appellant, the respondent's advocate submits, did not object to the tendering of such exhibits. **Secondly**, the Warehouse Receipts (Exh. P1) bear the appellant rubber stamp impression on them showing that the appellant had received 185,000 kilograms from the respondent. **Thirdly**, the Warehouse Receipts (Exh. P1) clearly show that the appellant's official, a certain Octavian P. Dembe, whose name and signature appear at the bottom of each receipt, witnessed the delivery. **Fourthly**, the appellant did not mention the said Octavian Pembe which was a very relevant aspect more so when DW1 said she was not the one who prepared Exh. P1. **Fifthly**, the said Octavian P. Dembe was not called to deny that Exh. P1 was not prepared by him, instead DW1 just said Exh. P1 was fake without any elaboration. On this proposition, the respondent's counsel submits that the testimony of the appellant through DW1 was but hearsay. Worse still, he argued, the appellant did not give any reason why the said Octavian P. Dembe was not called to testify. Anchoring his argument on **Aziz Abdallah v. Republic** [1991] TLR 71 and **Mujuni Kataraiya v. Samwel Luangisa** [1996] TLR 53, he submitted that an adverse inference should be made for such failure to produce such important witness. He added that

the appellant's three grounds of appeal have no leg on which to stand because they hinge on the appellant's hearsay denial by DW1 that the appellant received 185,200 kilograms of coffee out of which she paid for only 64,949 kilograms worth USD 167,689.84 or Tshs. 263,273,048/80 thereby leaving an unpaid amount of Tshs. 486,786,925/= for 120,251 kilograms.

Having submitted as above, the respondent's counsel prayed that the appeal should be dismissed.

In his short rejoinder, Mr. Massawe for the appellant reiterated his submission that, without the Parchment Tally/Receipt Note, Exh. P1 alone was not enough to prove that the appellant received the alleged coffee. The learned counsel added that the said Octavian P. Dembe who was said to have prepared Exh. P1 was in Zambia at the material time.

Having summarized the submissions of the parties, we should now be in a position to confront the three grounds of appeal brought to the fore by the appellant.

The appellant's argument in respect of the first ground of appeal is essentially that delivery of the alleged coffee could not be proved by Exh. P1 only but by Parchment Tally/Receipt Note. We have considered the appellant's argument and found ourselves failing to comprehend it. Perhaps for a better understanding of the verdict we are going to make on this ground we find it pertinent to reproduce the contents of the Warehouse Receipts under discussion; the subject of Exh. P1. It is in this format:

**"WAREHOUSE RECEIPT**  
(Warehouse Receipt Act No. 10 of 2005)

**Certificate of Pledge**

Dated of issue ..... 200.....

Warehouse No.....

Receipt No. WRB0011289

By this Warehouse Receipt is confirmed that the Warehouse .....

Located in .....

Received for storing from .....

(Name and Physical address of the Depositor)

Goods with following descriptions:

Type(s) and Origin of the Good	Physical Weight (kg)	Grade	Class	Moisture (%)		Storage Instructions
Physical Weight in words						

1. The goods are fully insured according to Insurance Policy No.....

2. The Nature and facts of Ownerships of the Goods .....  
(Solely/Jointly or Commonly Owned)

3. Warehouse Operator hereby undertakes to store the Goods

(i) In quality as above mentioned and .....  
(Specify Period)

(ii) With no financial interest in the goods covered by this receipt except a lien on the good.

(iii) For a fee of Tshs ..... as lien for .....

- (Amount) (Period)
4. The Holder of this Warehouse Receipt hereby undertakes
- (i) To pay the Warehouse Receipt Operation the specified Fee as lien
  - (ii) To inform the Warehouse Operation the any advances of liabilities incurrent by use of this receipt.

Depositors Signature .....

Authorized person to the Warehouse ..... Stamp .....

(Family name position) (Signature)"

The contents of the Warehouse Receipts in the case at hand augur well with what it should contain as prescribed by the Warehouse Receipts Act, 2005 – Cap. 339 of 2016 (henceforth the Warehouse Receipts Act) as amended by the Warehouse Receipts (Amendment) Act, 2015. Subsection (1) of section 33 thereof provides:

*"33.-(1) The warehouse receipt shall contain the following information and terms:*

- (a) the location of the warehouse where goods are stored;*
- (b) the date of issue of the receipt;*
- (c) the serial number of the receipt*
- (d) a statement whether the goods received will be delivered to the bearer, to a specified person or that specified person's order;*
- (e) a short description of the goods or of the packages containing them;*
- (f) the registered signatures of the authorized warehouse operator;*

*(g) the nature and fact of ownership of the goods, whether solely or jointly or commonly owned with others; and*

*(h) a statement as to the amount of advances made and of liabilities incurred."*

And the term "warehouse receipt" is defined by the Warehouse Receipts Act as:

*"... a receipt issued by a warehouse operator in respect of storage, handling or shipment of the commodity"*

And as if to clinch the matter, section 32 (1) thereof gives proprietary rights of the goods to the holder of the warehouse receipt. It provides:

*"32.-(1)Subject to the provisions of this Act, any warehouse receipt drawn and issued by a warehouse operator in accordance with the provisions of sections 5 and 31 shall be a proof of the holder having proprietary rights in the goods same as of that person in respect of which such warehouse receipt was issued ...."*

In view of the above, we think the respondent, on a balance of probabilities, through Exh. P1, proved that the consignment of coffee under

discussion was delivered to the appellant. In the circumstances, we find too cheap to buy the appellant's argument to the effect that Exh. P1 ought to have accompanied with the Parchment Tally/Receipt Note to prove that the alleged coffee was delivered to her. After all, there was an uncontested testimony of PW1 (at p. 72) and PW2 (at p. 78) that the Parchment Tally/Receipt Notes were in the hands, and under the custody, of the appellant. The above said, it is our considered view that the respondent proved delivery of the coffee in question through production of Exh. P1.

Having concluded as above, we would have dismissed the first ground and rested in peace if it were not for the appellant fronting through DW1 and Mr. Massawe a somewhat alternative argument to the effect that the Warehouse Receipts (Exh.) were forged. They, however, did not go further to state why they so alleged. We have considered this argument by the appellant. The position of the law on allegations of this nature has long been settled. In **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] E.A 314 at 316, the erstwhile Court of Appeal for East Africa articulated:

*"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt,*

*something more than a mere balance of probabilities is required."*

The same position was taken by the Court in **Omari Yusuph v. Rahma Ahmed Abdulkadr** [1987] TLR 169, at 174 as follows:

*"... it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases ..."*

The Court went on to state the rationale behind this otherwise stringent principle as follows:

*"... the logic and rationality of that rule being that the stigma that attaches to an affirmative finding of fraud justifies the imposition of a strict standard of proof, though as Rupert Cross cautions and illustrates in his text-book on Evidence at page 124 the application of that rule is not always commodious ..."*

And in **Musoke v. Mayanja** [1995–1998] 2 EA 205 the Supreme Court of Uganda quoted the following excerpt from its previous decision in **Okello v. UNEB**, Civil Appeal No. 12 of 1987 (unreported):

*"It is well established that where the party relies on fraud, that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleadings."*

We subscribe to the position taken by the Supreme Court of Uganda as depicting the correct position of the law in this jurisdiction as well.

In view of the foregoing, it is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being a very serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases.

Adverting to the case at hand, the appellant did not plead fraud in the Written Statement of Defence. At para 5 of the Written Statement of Defence, the appellant simply said there were no such deliveries to her. Not a complaint came forth regarding forgery. The allegation just surfaced in the testimony of DW1; during cross examination by the respondent's counsel. We do not think the appellant proved this allegation to the required standard; a standard higher than the balance of probabilities - not even on the balance of probabilities.

As an extension to the above arguments, the appellants submitted that the High Court shifted the burden of proof onto her. We profoundly disagree. It was the appellant who claimed that Exh. P1 collectively was forged. Under the elementary principle of he who alleges must prove; the principle embodied in section 110 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (henceforth the Evidence Act), it was incumbent upon the appellant to prove that fact. A prudent person would have expected that the said Octavian P. Dembe who was said to have prepared Exh. P1 would have been called to testify that the documents were forged. That was not done and in such circumstance, the court is entitled to draw an inference adverse to the appellant's case – see: **Hemedi Saidi v. Mohamedi Mbilu** [1984] TLR 113; the decision of the High Court to which we subscribe and **Azizi Abdalah v. Republic** [1991] TLR 71 and **Gabriel Simon Mnyele v. Republic**, Criminal Appeal No. 437 of 2007 (unreported). In **Gabriel Simon Mnyele** the court, grappling with an akin situation, articulated:

*"... under section 143 of the Evidence Act (Cap 6-RE 2002) no amount of witnesses is required to prove a fact - See **Yohanis Msigwa v. Republic** [1990] T.L.R. 148. But it is also the law (**section***

***122 of the Evidence Act)*** that the court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons - See ***Aziz Abdalla v. Republic*** [1991] T.L.R. 71.”

Flowing from the above, we are certain that the appellant should have procured Octavian P. Dembe to testify for her failure of which the court is entitled to take adverse inference against the appellant that had he been called he might have testified against the appellant’s case. For the avoidance of doubt we do not accept Mr. Massawe’s statement from the bar that the said Octavian P. Dembe was in Zambia at the material time. That, being a statement from the bar, is unacceptable. If anything, that is purely an afterthought, for, had it not it would have featured in the High Court. The first ground of appeal therefore fails.

Next for consideration is the second ground of appeal. Having resolved the first ground of appeal in the manner we have done above, the answer to the second ground becomes obvious. The High Court did not err in ordering payment as it did, for, the respondent had sufficiently established that she delivered the alleged coffee to the appellant.

The third ground of appeal will not detain us. The gist of this complaint is that the High Court did not consider the strong evidence of the appellant's witness. We find no scintilla of merit in this complaint. We will let the record of appeal speak for itself. The learned High Court judge observed at p. 137 of the record:

*"I have carefully considered the arguments from both sides; at the outset I am of the considered view that the claim of DW1 that the Warehouse Receipts are forged documents deserves less consideration. Had there been forgery of signature or rubber stamp on the warehouse receipt, it was imperative for the defendant to produce independent evidence proving the real signature or rubber stamp. Again under normal circumstances, anyone could have expected the defendant to take initiative to call the employee alleged to have signed the ware house receipts and that employee in fact could have possibly explained whether or not his signature was forged."*

And after referring to the provisions of section 101 (a) of the Evidence Act, the learned High Court Judge went on at p. 139:

*"Relating such position of the law to the present case, I stand to believe that the contents in the warehouse receipts could only be invalidated, contradicted or varied by the defendant vide producing adverse instrument proving that the warehouse receipts tendered by the PW1 were obtained out of fraud, forgery or mistake of fact or law. In regard to that perspective, I am of the considered opinion that the mere oral testimony of DW1 that the receipts were forgery documents carries no weight. I therefore believe that the warehouse receipts so tendered are valid documents.*

She went on:

*On the other hand DW1 challenged the validity of the warehouse receipts on the sense that it was impossible for the plaintiff to be given such receipts before the issuance of parchment tally despite of their admission. PW1 and PW2 stated that some of the documents including the parchment tally remained with the defendant from the time they started debating about the debt matters ...."*

With what was articulated by the High Court in the foregoing excerpts, we do not have any flicker of doubt that the testimony of the appellant's witness was considered to the hilt. We find no iota of truth in the appellant's complaint. The third ground of appeal also fails.

In view what we have stated above, we find this appeal seriously wanting in merits. It stands dismissed with costs to the respondent.

It is so ordered.

**DATED** at **MBEYA** this 31<sup>st</sup> day of October, 2019.

R. E. S. MZIRAY  
**JUSTICE OF APPEAL**

R. K. MKUYE  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

The Judgment delivered on this 1<sup>st</sup> day of November, 2019 in the presence of Mr. Victor Mkumbe, holding brief for Mr. Thomas Massawe for the Appellant and Mr. Hamimu Luvanda, Manager of the Appellant and Mr. Victor Mkumbe, counsel for the respondent is hereby certified as a true copy of the original.



  
A.H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**