IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 187 OF 2017

CHESANO COTTON GINNERY.....APPELLANT

VERSUS

JIELONG HOLDING TANZANIA LTD.....RESPONDENT

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

(Mruma, J.)

dated the 13th day of March, 2017
in
Commercial Case No. 20 of 2016

JUDGMENT OF THE COURT

20th March & 22nd April, 2020

KWARIKO, J.A.:

The respondent sued the appellant in the High Court of Tanzania, Commercial Division at Dar es Salaam claiming TZS 547,788,800.00 being the outstanding balance plus interest as of December, 2015. She also claimed interest on the principal sum at the contractual rate of 16% per annum from 31/12/2015 to the date

of judgment and interest at court's rate of 7% per annum from the date of judgment to full payment and costs of the suit. The background of this dispute dates back from 19/6/2015 when the parties entered into an agreement whereby the appellant covenanted to supply to the respondent 1500 metric tons of cotton seeds at a purchase price of TZS 918,000,000.00. Out of the purchase price, TZS 15,000,000.00 was to cater for the appellant's operational costs and TZS 3,000,000.00 as costs for sewing and loading bags. In that endeavour, the respondent paid TZS 915,000,000.00 into the appellant's bank account. The contractual period was to expire before November, 2015.

Despite the respondent fulfilling her part of the bargain by paying the agreed amount, the appellant did not supply the cotton seeds as contracted. This is because at the end of the contractual period, the appellant had only supplied 664,265 kilograms leaving a balance of 835,735 kilograms worth TZS 509,798,350.00. Despite several demands, the appellant did not make good his promise. To

prove the foregoing allegations, the respondent had only one witness Gemi Shayo (PW1).

On her part, the appellant denied the claim alleging that it was the respondent who breached the agreement and that the balance of Tshs. 509,789,350/= was exaggerated.

At the trial, the appellant called only one witness Peter Bahini Noni (DW1), the Managing Director of the appellant's company who did not dispute the contract. However, he blamed the respondent for the breach stating that the appellant timely obtained cotton seeds in the required quality and quantity as agreed. According to DWI, it was the respondent who was duty bound to arrange for its own transport facilities to collect cotton seeds from the appellant's business premises at Ramadi, Simiyu Region and take to the respondent's premises in Shinyanga Region. DW1 claimed that the respondent collected only 550 metric tons and for unknown reasons failed to collect the remaining consignment. Further to that, without mutual consent, the respondent assigned Mt. Meru Company who was not privy to their contract to collect the remaining consignments of cotton

seeds from the appellant's premises. Mt. Meru collected some and failed to buy the whole consignment as directed, hence the appellant incurred security and storage costs.

After a full trial and upon consideration of the evidence and exhibits, the trial High Court was satisfied that the respondent had proved its case on the required standard and proceeded to award TZS 509,798,350/= instead of 547,788,880/= claimed as outstanding sum with interest on the said sum at 16% per annum from the date it fell due to the date of judgment and costs of the suit.

The appellant was dissatisfied with that decision and appealed to the Court on the following grounds: -

> *"(1). That the Honorouble High Court Judge erred in law and upon facts in holding as he did that the Appellant breached the contract in total disregard of the adduced evidence showing that it was the Respondent who failed to collect within the agreed time the total quantity*

of the purchased stocks of cotton seeds from the Appellant's premises; and

(2) That the Honorouble Trial Judge of the High Court erred in law and upon facts in ordering the Appellant to pay refund of the outstanding purchase price amounting to Tshs 509,798,350/= plus interest at the rate of 16% per annum from the date of the plaint to the date of judgment without any proof that the non-delivery of the agreed total quantity of cotton seeds was caused by insufficient stocks."

Pursuant to Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) the appellant filed written submission in support of the appeal. The respondent did alike by way of a reply written submission in terms of Rule 106 (7) of the Rules. At the hearing of the appeal, Messrs. Mashiku Sabasaba and Gasper Nyika, learned advocates appeared for the appellant and the respondent respectively. They each urged the Court to consider the respective

submissions and made oral submissions to highlight on some aspects in the appeal.

Submitting in support of the first ground, Mr. Sabasaba faulted the trial High Court for shifting the burden of proving the case to the appellant while that burden lied on the respondent who had filed the suit. He argued that, the respondent failed to prove that she went to collect the cotton seeds but did not find any. On the burden of proof, Mr. Sabasaba referred us to sections 110 (1) and 112 of the Evidence Act [CAP 6 R.E. 2019]. He further argued that Mt. Meru Company was tasked to collect cotton seeds on 04/12/2015 which shows that the respondent was not only unprepared to collect the contracted cargo within time but also had extended the formal contractual period upon its expiry in November, 2015.

As regards the second ground, Mr. Sabasaba argued that the refund of the deposit balance of the purchase price was subject to proof that the appellant failed to complete the supply of the consignment due to insufficient quantity of cotton seeds. He argued that, on the contrary, in this case it is the respondent who failed to

collect the stocks which were available and thus the allegation that there were no cotton seeds cannot stand. He contended further that, there was no investigation conducted to establish that the appellant had no sufficient seeds, and if that was the case, there couldn't have been any issue of sale of the seeds to a third party. Counsel blamed the respondent for the breach of the contract for her failure to collect cotton seeds. Prompted by the Court, Mr. Sabasaba submitted that it was the practice of the respondent to collect the seeds from the appellant and the parties had communicated orally about the collection of the seeds by Mt. Meru Company on behalf of the respondent.

In response to the foregoing submission, Mr. Nyika submitted that the source of the claim was the failure by the appellant to deliver the cotton seeds. He argued that as per clauses 7 and 8 of the contract (exhibit P1), the appellant ought to have delivered the cotton seeds by November, 2015. He referred us to pages 53, 54 and 55 of the record of appeal in which the respondent wrote a demand

notice requiring the appellant to refund the outstanding amount but in vain.

The learned advocate also made reference to the resolutions reached between the appellant, the respondent and the TIB, the appellant's bankers, contained in exhibit D1. He argued that the resolutions do not say that the appellant should have told the respondent that the seeds were ready for collection rather, the appellant agreed that she had failed to deliver hence she was ready to refund which signified acknowledgment of breach of the contract. With regard to the date of the resolution in exhibit D1, the learned counsel pointed out that, the year appearing therein ought to be 2016 because the parties had not yet entered into the contract in January, 2015.

In relation to the second ground, Mr. Nyika contended that the trial court did not err by ordering payment of the balance of the purchase price plus interest because it found that the appellant had breached the contract. He urged us to dismiss the appeal.

In a brief rejoinder, Mr. Sabasaba did not comment about exhibit D1 on ground that the letter is dated 2016 after the expiry of the agreement. He insisted that in December 2015, Mt. Meru Company collected the seeds and the respondent acknowledged receipt and so it cannot be said that the agreement ended in November, 2015. Finally, he urged us to allow the appeal.

We have considered the rival arguments of the learned advocates in respect of the grounds of appeal. It is noteworthy that the determination of ground one has a direct bearing on ground two. In relation to the first ground of appeal, according to the evidence on record it is not disputed that the respondent performed its contractual obligation by depositing the purchase price into the appellant's bank account. The evidence further shows that the appellant did not supply the whole amount of cotton seeds as agreed. The appellant insisted that it is the respondent who failed to collect the cotton seeds which was available for collection. We have perused the parties' agreement (exhibit P1) and found no provision on the mode of delivery of the seeds to the respondent. However,

there is uncontroverted evidence by PW1 that the appellant used to call the respondent whenever there were seeds to collect and in fact, the respondent used her own trucks to collect the seeds. PW1's evidence shows that when the appellant failed to call the respondent to collect the seeds and upon follow-ups, there was nothing to collect until the contractual period expired. In our considered view, despite the absence of the mode of delivery in exhibit P1, the appellant was duty bound to ensure that the seeds were collected considering that the respondent had already fully paid for the same. By the appellant's own admission through DW1, she did not even write to the respondent to require her to collect the seeds if at all they were lying uncollected. Being the supplier, she was required in law to ensure that the goods were collected either by physical delivery or by calling the respondent to collect, as the case may be more so because the same had already been paid for. Section 29 of the Sale of Goods Act [CAP 214 R.E. 2002] provides thus: -

> *"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for*

them, in accordance with the terms of the contract of sale."

The appellant did not adduce any evidence proving that it is the respondent who failed to collect the seeds after notification that they were ready for collection. In view of the foregoing, it cannot be said that the trial court shifted the burden of proof of the case to the appellant.

The appellant's contention that the respondent failed to collect the seeds and later assigned Mt. Meru Company to do it on her behalf has no merit for two reasons. First, Mt. Meru Company was not privy to the agreement. Worse still, clause 10 of the contract restricts any modification or termination and if any, must be done in writing. It provides that: -

"Modification & termination: Modifications and termination to this agreement shall be made by mutual consent of the parties, by the issuance of a written letter, signed and dated by authorized officials, prior to any changes being performed."

It is apparent that clause 10 restricted any modification or termination of the agreement except by mutual consent through a letter. No evidence was adduced to prove that there was mutual agreement between the parties to allow Mt. Meru Company to collect cotton seeds from the appellant. Secondly, even if the respondent allowed the said company to collect the seeds on 4/12/2015, that was after the expiration of the contractual period. In the circumstances, the appellant's criticism against the trial court is baseless because that court was satisfied that the appellant breached the contract considering that she admitted liability in the resolution dated 8/1/2015 and agreed to refund the respondent the outstanding balance. In the same document, it was shown that the respondent had consented to the appellant's request to sell the cotton seeds to a third party. This ground is therefore without merit and we dismiss it.

Having dismissed ground one, the second ground must follow suit. This ground is devoid of merit because it is clear that the appellant failed to deliver the whole contracted amount of cotton seeds hence liable to refund the outstanding purchase price.

In the light of the foregoing, we find that this appeal is devoid of merit and we accordingly dismiss it with costs.

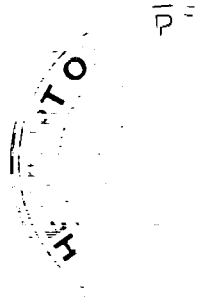
DATED at **DAR ES SALAAM** 17th day of April, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of April, 2020 in the presence of Mr. Mashiku Sabasaba, learned counsel for the appellant and Mr. Antonia Agapiti, learned counsel for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL