IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., MWANDAMBO, J.A. And KEREFU, J.A.)

CIVIL APPEAL NO. 118 OF 2017

TANZANIA CIGARETTE COMPANY LIMITED..... APPELLANT

VERSUS

MAFIA GENERAL ESTABLISHMENT..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania Commercial Division at Dar es Salaam)

(Mansoor, J)

dated the 28th day of October, 2016

in

Commercial Case No. 137 of 2015

JUDGMENT OF THE COURT

18th & 31st March, 2020

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, Commercial Division at Dar es Salaam (Mansoor, J) dated 28th October, 2015 in Commercial Case No. 137 of 2015. In that case, Tanzania Cigarette Company Limited, the appellant herein sued Mafia General Establishment, the respondent for payment of a sum of US$ 38,796.98 (Equivalent to TZS. 84,577,416.4 at the exchange rate of US$ 1 = TZS

2180 as at 30th November, 2015) being a refund of the money paid to the respondent for wrong and partial delivery of cleaning materials to the appellant. The appellant also claimed for the payment of interest, general damages and costs of the suit.

The material facts of the matter obtained from the record of appeal indicate that, on 30th March, 2012 the appellant engaged the respondent to supply her with high level cleaning materials (the goods) vide purchase order No. 4501408523 (exhibit P2). The purchase order was based on Proforma Invoice No. 0707 issued by the respondent worth US$. 38,796.98. The respondent delivered the said goods to the appellant on 7th May, 2012 evidenced by a delivery note (exhibit P3). Accordingly, the appellant received the goods, signed the delivery note and effected payments at the tune of US$ 38,796.98 as agreed. On 11th July, 2012 the appellant wrote a letter (exhibit P4) to the respondent informing her that the goods supplied did not match with the quality described in exhibit P2 and so she rejected the said goods and returned them to the respondent. According to her letter dated 12th July, 2012 (exhibit P5) signed by one Michael Mtweve, the respondent is shown to have acknowledged the defects and admitted that it was her own fault. The appellant's

communications requesting the respondent to remedy the situation ended in vain. As such, the appellant decided to institute the suit as indicated above.

In her written statement of defence, the respondent denied the claim and prayed for the dismissal of the suit on the grounds that, the claim by the appellant has no legal basis as the goods were properly and wholly delivered in accordance with the purchase order and payment was duly made to the respondent as agreed.

Having heard evidence from both parties' witnesses namely; Besta Sadallah, who testified as PW1 for the appellant and Gaudence Sauli Urassa who testified as DW1 for the respondent, the trial court found that the appellant had failed to prove her case on the balance of probabilities, hence dismissed the case with costs. Aggrieved, the appellant lodged this appeal. The Memorandum of Appeal raises three (3) grounds of appeal, namely:-

1) *The trial court erred in law and facts having held that delivery of goods does not necessarily mean acceptance but at the same time holding that a mere issuance of delivery note by purchaser was a proof of quality of goods contracted;*

2) *The trial court erred to hold that there was no proof that Mtweve was not agent for the Respondent while there was ample evidence in court verifying that he was agent for the Respondent; and*

3) *The trial court failed to evaluate the evidence on record leading injustice to the appellant.*

When the appeal was placed before us for hearing, Mr. Paschal Kamala, learned counsel, entered appearance for the appellant. Mr. Gaudence Sauli Urassa, the respondent's Managing Director appeared for the respondent in his personal capacity, unrepresented. Pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as amended by GN No. 344 of 2019 both parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition of the appeal, which they sought to adopt at the hearing to form part of their oral submissions.

In arguing the first ground of appeal, Mr. Kamala contended that the trial Judge wrongly interpreted the meaning and purpose of a delivery note. He argued that, a delivery note deals only with descriptions of quantity and type of goods delivered but not quality and fitness of those goods. To bolster his position, he cited sections 15 and 16 of the Sale of

Goods Act, [Cap. 214 R.E 2002] (the Act) and argued that, examination of the condition and fitness of the supplied goods is a right of the buyer and one of the key components of implied conditions in contract for the sale of goods which cannot be defeated by a mere signing of a delivery note. He contended that it was wrong for the trial Judge to hold that signing of a delivery note amounted to acceptance of the delivered goods.

Mr. Kamala further faulted the decision of the trial Judge by holding that, since the buyer had effected payment upon delivery and receipt of the said goods, she could not reject them after a lapse of two months. Mr. Kamala argued strongly that a period of two months used by the appellant to examine and inspect the said goods was reasonable time provided for under section 36 (1) and (2) of the Act. He argued further that the appellant being a big company with several orders, it was justified to examine the goods within such period because most of big companies place orders while goods are still in stock. According to him, it was not proper for the trial Judge to hold that goods supplied were merchantable, because, the appellant did not want ordinary merchantable goods but high level cleaning materials. To bolster his position he cited to us old cases of **Priest v. Last** (1838)4 M&W. 399, **Lemy v. Watson** (1915) 3 R.B 731 at

752 and **Doola Singh & Sons v. The Uganda Foundry & Machinery Works** 12 EACA 33.

With regard to the second ground of appeal, Mr. Kamala submitted that, the appellant dealt with one Michael Mtweve whom she believed to be the right officer authorized by the respondent to handle that transaction. According to him, before the trial court, it was the duty of the respondent to prove that the said Michael Mtweve was not her employee or agent. He cited section 37 of the Companies Act, [Cap. 212 R.E 2002] and argued that a party dealing with a company has no duty to enquire if a person acting for the company has powers to do so or not. It was his further submission that, a mere denial by the respondent that the person who communicated with the appellant was not known to her was not sufficient.

In his view, the respondent was required to produce a list of all personnel authorized by her to deal with the appellant's transaction. Mr. Kamala contended that, the appellant dealt with different people, at the respondent's office to process her transaction. He referred us to the Proforma Invoice and Delivery Note (exhibits P2 and P3) found at pages 109 and 111 of the record of appeal, respectively and argued that the two documents were handled by different people. To justify his claim, he

invited us to examine the handwritings in the said two documents and find that the appellant's transaction was handled by different people. He further argued that, since the communication with Michael Mtweve used the same name and address as indicated in exhibits P2 and P3, which were not objected by the respondent, the respondent is estopped from denying the communication the appellant made with Michael Mtweve through exhibit P5.

As for the third ground of appeal, it was the argument of Mr. Kamala that if the trial Judge could have properly evaluated the evidence tendered before her, she would not have arrived at an erroneous decision and dismissed the appellant's suit. On that basis, he invited the Court to re-evaluate the entire evidence on record, make its own findings, allow the appeal, quash and set aside the decision of the trial court with costs.

In response, the respondent argued in general terms that all what had been submitted by Mr. Kamala are baseless, vexatious and frivolous. The respondent argued further that the trial court had properly analyzed the evidence adduced before it and arrived at the right decision and there is nothing to fault that decision.

As for the first ground of appeal, the respondent argued that before the trial court, though the appellant claimed that the goods were examined by his officer one David Nderimo two months after delivery of the said goods, she failed to tender any inspection report and even the said David Nderimo was not called to testify to prove that fact.

On the second ground, the respondent submitted that, though the appellant claimed to have communicated the defects with Michael Mtweve, she failed to prove before the trial court whether the said Michael Mtweve was the authorized officer of the respondent to handle that transaction. On the whole, the respondent contended that, the appellant failed to lead evidence to prove her case to the required standard as per sections 110 and 112 of the Evidence Act, [Cap. 6 R.E 2002], (the Evidence Act) hence the trial Judge rightly dismissed the case. On the basis of her submissions, the respondent urged us to dismiss the entire appeal with costs.

Mr. Kamala had nothing useful in rejoinder submissions except reiterating his prayer that the appeal be allowed with costs.

On our part, having examined the record of appeal and considered the rival submissions made by the parties, we are now ready to determine

the grounds of appeal. We wish to preface our discussion by observing that this being a first appeal, we are entitled to review the evidence on record to satisfy ourselves whether the findings by the trial court were correct. This task is bestowed upon us by the provisions of Rule 36 (1) of the Rules. See also cases of **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 and **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development & Another**, Civil Appeal No. 57 of 2017 (both unreported).

Starting with the first ground, there is no dispute that on 30th March, 2012 the appellant engaged the respondent to supply her with the goods via purchase order No. 4501408523 (Exhibit P2) and Proforma Invoice No. 0707 issued by the respondent worthy US$. 38,796.98. It is also not in dispute that the respondent had since delivered the said goods to the appellant on 7th May, 2012 and the appellant received those goods and effected payment as agreed. Two months after payments had been made, the appellant claimed that upon inspection of the said goods, she noted that the same had defects resulting into rejection and return of them to the respondent.

After evaluation of the entire evidence tendered before her, the trial Judge found that the appellant was not justified to reject and return those goods. Mr. Kamala faulted the said decision by the trial court and cited section 36 (1) and (2) of the Act. The said section on which Mr. Kamala placed reliance provides that:-

> *(1)* ***Where goods are delivered to the buyer*** *which he has not previously examined,* ***he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them*** *for the purpose of ascertaining whether they are in conformity with the contract; and*
>
> *(2) Unless otherwise agreed,* ***when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods*** *for the purpose of ascertaining whether they are in conformity with the contract. [Emphasis added].*

From the above provisions, specifically, section 36 (1) of the Act there is no doubt that it gives right to the buyer to be afforded an opportunity within a reasonable time to examine or inspect the goods after delivery and acceptance of a delivery note. However, sub-section 2 of the same section provides that the said exercise is done upon request which

means that the buyer must request to be afforded an opportunity to do so. In the case at hand, there is no evidence that upon receipt of the said goods the appellant requested the respondent to be afforded that opportunity.

In addition, our further perusal of the record of appeal at page 86 reveals that the learned trial Judge correctly observed that though PW1 claimed that the said goods were inspected twice by the two officers namely, Paschal Otebo and David Nderimo, there was no any inspection report issued and tendered before the trial court to prove that fact.

The trial Judge further observed that the two appellant's officers, who were alleged by PW1 to have conducted the two inspections, were not summoned to testify before the court to prove that fact. We agree with the learned trial Judge's conclusion that the appellant failed to prove and establish that the said examination or inspection was conducted. For the sake of clarity we take the liberty to reproduce what was observed by the trial Judge at page 86 of the record of appeal:-

> *"...The inspection in this case as testified by Mr. Besta Sadallah (PW1) was made by the internal customer department by a person known as Pascal Otebo. He however, testified that that*

Pascal Otebo did not issue the Goods Received Note, a document verifying that the goods were inspected and properly received... *PW1 also testified that the proper inspection of the goods received was carried out by an officer known as Mr. David Nderimo, but* ***Mr. Nderimo also did not issue any inspection Report to prove that he had also inspected the goods for the second time*** *and after two months after the actual delivery...****the plaintiff did not bring for testimony either Mr. Otebo who did the first inspection or Mr. Nderimo who did the second inspection. In fact there is no proof at all if the inspection were really carried out before the goods were accepted."*** [Emphasis added].

It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act. It is equally elementary that the standard of proof in this case was on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and the said burden is not diluted on account of the weakness of the opposite party's case. A commentary by the learned authors **M.C. Sarkar, S.C. Sarkar and P.C.**

Sarkar in Sarkar's Law of Evidence, 18th Edition 2014 at page 1896 published by Lexis Nexis, persuasively, discussing a section of the Indian Evidence Act, 1872 which is similar to ours reveals the following:-

> "...***the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party***..." [Emphasis added].

We subscribe to the above position as it reflects a correct legal position in the context of the matter under scrutiny. In our considered view, since the appellant had failed to prove her case on the required standard that the said inspection was actually conducted, there is no justification to fault the findings by the learned trial Judge. In our view, the issues of buyer's right to inspect the said goods and reasonable time used for inspection argued by Mr. Kamala together with all cases cited are

irrelevant because the appellant was, in the first place, required to prove with concrete evidence that the said examination/inspection was actually conducted. Failure to do so rendered other issues to be superfluous. In the circumstances, we find the first ground of appeal to be devoid of merit and we hereby dismiss it.

On the second ground, Mr. Kamala faulted the decision of the trial Judge by arguing that it was the duty of the respondent before the trial court, to prove that Michael Mtweve who dealt with the appellant was not her employee or agent. With respect we find the submission by Mr. Kamala to be misconceived. In our considered view, since the burden of proof was on the appellant, he cannot rely on the weakness of the respondent's case.

Unlike Mr. Kamala, we take the view that, the appellant ought to have conducted due diligence to satisfy herself if Mr. Mtweve was a duly authorized employee or agent of the respondent. The appellant acted negligently, as she dealt with unauthorized person not known by the respondent. In the case of **Diamond Motors Limited v. K-Group (T) Limited,** Civil Appeal No. 50 of 2019 (unreported), when we considered a similar issue of an appellant dealing and transacting with unauthorized

person and the trial Judge found that the appellant was negligent, we observed at page 19 of the decision that:-

> *"We are in agreement with the learned trial Judge that, the appellant ought to have taken due diligence to satisfy himself as to whether Manase was a director or a duly appointed agent of the respondent. For instance, they ought to have received an authorization from the respondent and ensure that the Memorandum and Articles of Association of the company recognized him as a director and other verification for that purpose."*

Similarly, in the case at hand, the appellant was required to act diligently. In the event, it is our firm view that the appellant's criticism against the learned Judge is, with respect, without any justification and so, the second ground of appeal has no merit and it is equally dismissed.

On the last ground of the appeal, the appellant has urged us to re-evaluate the evidence on record, quash and set aside the decision of the trial court. Having re-evaluated the evidence tendered by both parties before the trial court within the confinement of the above legal principles, we are certain that the appellant has failed to prove her case on the balance of probabilities a standard required in civil cases. As such, we are

satisfied that the trial Judge properly analyzed the evidence availed before her and reached at an appropriate conclusion and so there is no justification to interfere with her decision.

In view of the above, we find the entire appeal to be devoid of merit and it is hereby dismissed with costs.

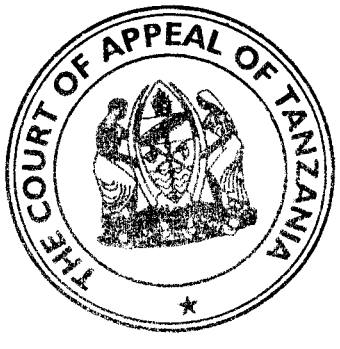
DATED at **DAR ES SALAAM** this 27th day of March, 2020.

R. E. S. MZIRAY
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 31st day of April, 2020 in the presence of Ms. Ester Msangi, learned Counsel for the Applicant and Mr. Gaudence Saul Urassa, the respondent's Managing Director appeared for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL