IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A, SEHEL, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 76 OF 2019

MUSTAFA EBRAHIM KASSAM T/A

RUSTAM AND BROTHERS ..... APPELLANT

VERSUS

MARO MWITA MARO ..... RESPONDENT

(Appeal from an Ex-parte Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Nyangarika, J.)

Dated the 7th day of May, 2012

in

Commercial Case No. 91 of 2011

JUDGMENT OF THE COURT

23rd March & 29th April, 2022

WAMBALI, J.A.:

The appellant, Mustapha Ebrahim Kassam t/a Rustam and Brothers instituted Commercial Case No. 91 of 2011 against the respondent, Maro Mwita Maro at the High Court of Tanzania, Commercial Division at Dar es Salaam.

According to the plaint, it was contended that on 2nd November, 2010, the appellant entered into a business agreement with the respondent for supply of goods on credit. It was further pleaded that under that agreement the respondent agreed to take goods from the appellant's shop

and thereafter effect payment within seven days from the date of delivery; failure of which, the unpaid amount would attract an interest of 20% accruing one month from the date of default.

Following the said agreement, the appellant stated at the trial court that the respondent took various goods from the shops but defaulted to effect payment after the expiry of the agreed period of seven days. It was thus plainly pleaded by the appellant that the total amount of the unpaid money for goods delivered to the respondent over a considerable period during the subsistence of the agreement stood at TZS. 44,612,250.00 plus the interest of TZS. 8,922,470.00.

In the circumstances, on 4th August, 2011 the appellant notified the respondent concerning the default, the outstanding debt plus interest and the intention to sue him, but he did not reply to the claim. As a result, the appellant instituted the suit at the High Court as alluded to above, in which she claimed a total of TZS. 53,534,705.00; being the outstanding debts plus interest for default, 12% interest of the decretal sum from the date of delivery of the judgment to the date of payment in full, costs of the suit and any other relief the trial court would have deemed fit to grant.

We further note from the record of appeal that the respondent defaulted to lodge the Written Statement of Defence within the period of twenty one (21) days prescribed by law and his application for extension of time was dismissed by the trial court, hence the appellant was allowed to prove the case ex-parte.

At the ex-parte hearing, the trial court framed three issues for determination of the suit as hereunder: -

> *"1. Whether there was a trade contract between the parties.*
> *2. Whether there was any breach to the said contract by the defendant.*
> *3. What relief, if any, are the parties entitled."*

During the trial, Charles Tibekebuka, the General Manager of the appellant testified as PW1 and indeed he was the only witness in support of the case. In his brief testimony, PW1 stated that he knew the respondent as the appellant's customer who entered into a business agreement on 2nd November, 2010. To prove the case in support of his oral evidence, PW1 tendered a business agreement entitled: *"Mkataba wa Biashara kati ya Rustam and Brothers na Mr. Maro Mwita Maro"* executed

on 2nd August, 2010 and duly stamped by the Registrar of Titles and Documents on 24th September, 2010, which was admitted as exhibit P1.

PW1 further tendered another document with a mark "R & B" titled "Rustam & Brothers, Ankara" which was admitted as exhibit P2. The said document was explained to be a bill for supply of goods showing the date, credit, debit and balance in which the respondent allegedly signed to acknowledge that he had taken various goods on credit from the appellant's shops.

Lastly, PW1 tendered a letter containing notice to terminate the agreement and intention to sue dated 4th August, 2011 entitled: *"YAH: KUSITISHA MKATABA/KUSUDIO LA KUKUSHITAKI".*

After the appellant closed the case, the trial judge evaluated the evidence and though he answered the first issue in the affirmative, in the end, he did not decide in favour of the appellant with respect to the second issue, and thus he ultimately dismissed the suit.

Admittedly, during consideration of the evidence, initially the trial judge casted doubt on the apparent variance between the oral evidence of PW1 and exhibit P1. The raised doubt centered on the issue whether the

agreement between the parties was really entered on 2nd November, 2010 as alleged in the plaint and the testimony of PW1 since it is indicated to have been signed on 2nd August, 2010. He plainly observed that the appellant's witness (PW1) did not bother to explain on the apparent variance between his testimony in court and the contents of exhibit P1 in respect of the date of execution. He also observed that the plaintiff (appellant) was not able to demonstrate that indeed the defendant (respondent) received or had in possession a copy of the said agreement, which in his view, sufficed to make him entertain doubt on the existence of the agreement.

Nonetheless, as intimated above the trial judge answered the first issue in the affirmative. Particularly, he remarked and found as follows: -

> *"The above notwithstanding, I find the document as such to render the existence of the said contract highly probable and as such it passes the standard of proof test which requires the balance of probabilities. It follows therefore, that the first issue is in the affirmative."*

With regard to the second issue, as briefly intimated above the trial judge answered it in the negative on the finding that though the case was

prosecuted *ex-parte* by the appellant, the evidence on record left "*some crucial notes untied*". Basically, the trial judge gave the following reasons for reaching that conclusion. **One**, exhibit P2 did not indicate what exactly were the particular goods taken by the respondent and on what amount as PW1 gave them general description in the form of "*various goods including cooking oil*". **Two**, exhibit P2 contains details dating from 24th June, 2008 which was before the alleged signing of the agreement. He explained that PW1 was not led in his evidence to substantiate the composition of the claim on the shown date and that even the corresponding signature purporting to be that of the respondent is dated 2nd July, 2010 before the alleged agreement was signed by the parties. Besides, he found that there was no evidence that the agreement had to operate retrospectively. **Three**, apart from the existence of exhibit P2 showing the date, credit, debit, balance and signature, there was no scintilla of credible and ostensible evidence showing delivery notes or receipts with regard to the said transactions to associate the respondent with the alleged delivery of goods. Indeed, he noted, some of the entries were collectively signed to cover more than one transaction and no explanation was offered by PW1 in his evidence at the trial. **Four**, the appellant did not put forward the

evidence to prove delivery of the respective goods and in what quantity, though PW1 claimed that the delivery notes were at the appellant's office.

Having analyzed the evidence of PW1 and the defects in exhibit P2, in the end, the trial judge found the reliefs prayed by the appellant un-sustained and untenable, hence he dismissed the suit in its entirety.

The appellant is seriously aggrieved by the High Court's decision and has thus preferred the instant appeal. Initially, four grounds of appeal were lodged through a memorandum of appeal. However, before the hearing commenced, the appellant's counsel abandoned three of them; thus, the sole remaining ground of appeal is to the effect that: -

> *"The trial judge erred in law by holding that there was no breach of contract."*

The appeal was called on for hearing before us on 23rd March, 2022 in the presence of Mr. Abubakar Salim, learned advocate for the appellant and Mr. Maro Mwita Maro, the respondent in person, unrepresented.

In support of the appeal, Mr. Salim fully adopted the written submission lodged earlier on in Court and did not wish to briefly add anything useful apart from urging the Court to allow the appeal with costs.

On his part, the respondent who did not lodge written submission. He submitted orally in opposing the appeal. He briefly submitted that the appeal is devoid of merit as the appellant failed to prove before the trial court that an agreement was entered between the parties on 2nd November, 2010 as alleged in the plaint and by PW1. The epicenter of his submission was pegged on the contention that according to evidence on record, what was tendered at the trial and admitted as exhibit P1 shows that the alleged agreement is dated 2nd August, 2010 and not 2nd November, 2010. He therefore supported the decision of the High Court on the argument that the appellant failed to prove the case against him on balance of probabilities as required by law. In this regard, the respondent implored us to dismiss the appeal with costs.

Having heard the parties' positions for and against, we now turn to consider the merits of the appeal.

It is the contention of the appellant through the written submission that since the High Court found that a business agreement duly executed existed between the parties as evidenced by exhibit P1, it was not relevant to establish whether the respondent received the agreement as observed by the trial judge. That is why, it was submitted, though the trial judge

initially casted doubts on the authenticity of the agreement with respect to the date it was executed, he finally found as a fact that the first issue had to be answered in the affirmative.

In his further submission, the learned advocate argued that PW1 proved on the balance of probabilities that various goods were taken by the respondent on credit from the appellant's shops. That their total value was recorded in a book (as reflected in exhibit P2) which also indicated the amount paid by the respondent and the outstanding balance. It was thus emphasized that the respondent duly signed exhibit P2 to authenticate the transactions and as an acknowledgment of the debts.

Besides, Mr. Salim submitted, the finding of the High Court was wrong because, PW1's evidence stood unchallenged by the respondent and therefore, the non-payment of the outstanding debts constituted breach of the contract on the part of the respondent.

In the circumstances, the learned counsel faulted the trial judge for finding that the second issue could not be answered in the affirmative because there was no breach of the agreement entered by the parties. To this end, he urged us to reverse the High Court's decision and substitute thereof with the finding that the appellant proved the case on balance of

probabilities, and thereby enter judgment in her favour as prayed in the plaint with costs.

We prefer to preface our deliberation of the sole ground of appeal by alluding to the fact that this being the first appeal, the duty of the Court when considering an appeal from the High Court in exercise of its original jurisdiction, is clearly stated in Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In short, the Court may re-appraise the evidence in the record and draw inferences of facts to reach its conclusion (see **Charles Thys v. Hermanus P. Steyn,** Civil Appeal No. 45 of 2007 (unreported). We are however aware of the settled position that in the re-appraisal or re-evaluation role, the Court of Appeal should be slow to disturb the finding of a trial judge on a finding of fact merely because it takes a different view of the matter. Nonetheless, the Court can disturb the findings if the conclusion reached by the trial court or first appellate court is wrong and not supported by evidence, or it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law or procedure, or has occasioned a miscarriage of justice. For this stance, see for instance the decision of the Court in **Neli**

Manase Foya v. Damian Mlinga [2005] T.L.R. 167 among several decisions.

In this regard, we will certainly wish to satisfy ourselves as to whether the finding and conclusion of the High Court on the framed issues is backed by the evidence in the record of appeal.

To begin, there is no doubt that though the High Court initially casted doubts on the authenticity of exhibit P1 as alluded to above, it nonetheless found that the parties entered into a business agreement.

According to section 10 of the Law of Contact Act, Cap. 345 R.E. 2019 (the LCA) it is stipulated that: -

> *"All agreements are contracts if they are made by the free consent of parties competent to contract for a lawfui consideration and with a lawful object, and are not hereby expressly declared to be void..."*

We have closely examined exhibit P1 and we think that based on its contents, it cannot be concluded that the appellant and the respondent entered into a business agreement on 2nd November, 2010 as alleged by the appellant and found by the trial court. We say so because, firstly, as

rightly found by the trial judge, though the appellant indicated in the plaint and during PW1's evidence that exhibit P1 was entered and executed between the appellant and respondent on 2nd November, 2010; on the contrary, it is clear that the date of the agreement is vividly shown to be 2nd August, 2010. The appellant, therefore, did not prove on balance of probabilities that what was tendered at the trial court and admitted as exhibit P1 was the business agreement which was executed by the parties in the instant appeal on 2nd November, 2010 as conspicuously pleaded in paragraph 4 of the plaint and supported by the oral evidence of PW1. Unfortunately, as correctly observed by the trial judge in his initial remarks before he answered the first issue in the affirmative, though during his evidence at the ex-parte trial PW1 was firm that the agreement between the parties was entered on 2nd November, 2011, he did not attempt to clarify the variance on the dates between what is stated in the plaint and exhibit P1.

Secondly, despite the problem on variance of the dates, exhibit P1 does not show that it was duly entered between the current appellant and the respondent. To the contrary, our close scrutiny leads us to the finding that exhibit P1 in its opening statement categorically indicates that it was

entered on 2nd August, 2010 between "Mustapha Ebrahim Kassam and Zulfika Ebrahim Kassam trading as Rustam & Brothers to be known simply as "RUSTAMS" on the one part, and Mr. Maro Mwita Maro to be known as "MARO" on the other part. Indeed, it is noted that at the end of the agreement the two stated persons signed separately in the presence of one Justinian Byabato, advocate. The respondent is also indicated to have also signed in the presence of the same advocate. This being the case, the current appellant, namely Mustapha Ebrahim Kassam t/a Rustam & Brother who sued the respondent in Commercial Case No. 91 of 2011 cannot be taken to represent the parties indicated in exhibit P1 who allegedly entered into the agreement with the respondent. Besides, it is not indicated in exhibit P1 that the two persons signed as directors or officers of Rustam & Bothers (RUSTAMS) or in their private capacity. It is noted that a further confusion is brought by the fact that in the case at hand though Mustpha Ebrahim Kassam initially signed the plaint as the principal officer of the plaintiff, he later in the verification clause introduced himself as the plaintiff and so signed on 14th November, 2011.

In the premises, the doubts casted on the authenticity of the agreement (exhibit P1) is not only on the execution date, but also on the

description of the parties who entered into it compared to the parties in the case at hand. Most unfortunately, there is no evidence on record from the two signatories to exhibit P1 to explain the exposed issues with regard to the authenticity of the agreement. We must emphasize that at the trial the appellant was bound by her pleadings.

In the circumstances, had the trial court properly analyzed the evidence on record with regard to the contents of exhibit P1 amid the expressed doubts, it could not have come to the affirmative conclusion that the said agreement was entered between the parties in the instant appeal on 2nd November, 2010 as alleged by the appellant to the extent of answering the first issue in the affirmative. Besides, the failure of the appellant to prove that the agreement between the parties to the case existed as pleaded in paragraph 4 of the plaint, puts into question whether the issue of its breach could arise as contended by the appellant. Surprisingly, as we have intimated above though the case proceeded ex-parte, no witnesses to the agreement (exhibit P1) were summoned by the appellant to prove that the parties really entered into the agreement on the respective date and terms expressed therein.

Unfortunately, as the case was heard ex-parte, there is no evidence from the respondent on the existence of the alleged agreement as expressed in exhibit P1. It must however be noted that though the case proceeded ex-parte, the appellant was not relieved from the obligation to prove the case on balance of probabilities as required by law that the agreement was entered between the parties and on the alleged date.

Be that as it may, we are alive to the appellant's counsel criticism of the trial court finding that there was no breach of contract on the contention that, exhibit P2 and PW1's evidence did not prove on balance of probabilities that the goods were supplied to the respondent on various occasion but he failed to pay the outstanding amount. It was strongly contended by the appellant's counsel in the written submission that the trial court's decision is wrong because PW1's evidence at the trial was unchallenged by the respondent. We find this this argument to be incorrect because as we have said earlier on, the absence of the respondent to defend the suit at the trial did not relieve the appellant with the duty to prove the case to the required standard.

In this regard, we respectfully disagree with the appellant's counsel argument and fully associate ourselves with the reasoning and the

conclusion of the trial judge's findings with regard to the authenticity and reliability of exhibit P2 which we have made reference to above in connection of appellant's failure to prove that the agreement was breached. Thus, even if we were to rely on exhibit P2 on the alleged supply of goods to the respondent, still based on the exposed defects on the document and lack of sufficient information on the supplied goods, no breach on the part of the respondent would have been proved. Suffice to say that, apart from exhibit P2 showing that the delivery of goods started from 2nd August, 2010 which is before 2nd November, 2010 when the alleged agreement was reached; and it was not argued that it operated retrospectively, there is no indication therein of the kind of goods supplied to the respondent which are supported by delivery notes. Indeed, exhibit P2 shows that the respondent signed to have taken the alleged goods starting on 2nd July, 2010. Though the trial judge erroneously indicated that according to exhibit P2 the supply of the alleged unknown goods started on 4th August, 2010, the fact remain that the alleged supply started before 2nd November, 2010, which was before the alleged date of the existence of exhibit P1.

It follows that as the appellant failed to prove his case which was tried *ex-parte* and did not call other important witnesses who are signatories to exhibit P1, or witnesses to the delivery of the alleged goods to the respondent to support his case, he could not be entitled to the relief claimed in the plaint. In this connection, the trial court could have drawn adverse inference on the non-summoning of important witnesses to testify on the missing gaps to the evidence of PW1. It is instructive to reiterate, what was stated by the Court in **Hemedi Said v. Mohamed Mbilu** [1984] T.L.R. 113 that: -

> *"Where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an adverse inference that if the witness were called they would have given evidence contrary to his interests".*

Similarly, in the case at hand, we accordingly draw adverse inference to the effect that failure of the appellant to summon the two signatories to the alleged agreement or other witnesses who participated in the delivery of goods to the respondent indicates that if they were called they would have given evidence contrary to her interests.

Moreover, even in the letter which was admitted as exhibit P3 which concerns the notice directed to the respondent on the termination of the agreement (exhibit P1), there is no indication of the list showing the kind and nature of the alleged goods which were supplied by the appellant. What is indicated is basically the amount of the outstanding debt without more. This lacuna was not also filled by the oral evidence of PW1 as we have amply demonstrated in the course of our deliberation above.

Therefore, though under section 37 of the LCA it is a requirement that parties to the contact must perform their respective promises, it is settled law in terms of sections 110 and 111 of the Evidence Act, Cap 6 R.E. 2019 that he who alleges must prove the facts and that the onus of proof is placed on him to justify his claim. It is in this regard that in **Anthony M. Masanga v. Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (unreported) it was stated that: -

> *"...Let's begin by re-emphasizing the ever cherished principle of law that generally in Civil Cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and*

111 of the Law of Evidence Act, Cap. 6 Revised Edition, 2002".

(See also **Paulina Samson Ndawavya v. Theresia Thomas Madaha,** Civil Appeal No. 53 of 2017-unreported).

To the contrary, in the case at hand, the appellant did not discharge this burden despite pleading in the plaint that the parties entered into agreement and accordingly the alleged unknown goods were supplied to the respondent. From the evidence on record, we are settled that the appellant failed to prove the existence of the agreement and the breach of the same. For a contract contemplated under section 10 of the LCA to exist there should be acceptance and consideration on top of offer. This being a basic requirement, we are entitled to conclude that based on the evidence on record, it has not been substantiated by the appellant. In the circumstances of the instant appeal, the appellant cannot therefore be entitled to reliefs for the breach of contract by seeking refuge under the provisions of section 73 (1) of the LCA.

We are settled that the appellant has not fully proved that there was business agreement between the parties herein entered on 2nd November, 2011 and that she fulfilled or performed the obligation therein to conclude

that the respondent breached it. In this regard, the appellant cannot succeed in an action for specific performance of an agreement as he has not substantiated even by exhibit P2 that various goods were supplied to the respondent from 2nd November, 2010 to 20th June, 2011 as alleged in the plaint and testified by PW1.

From the foregoing, we find that the sole ground of appeal has not been substantiated by the appellant as argued by the respondent. Ultimately, we reject it.

In the result, we dismiss the appeal in its entirety with costs.

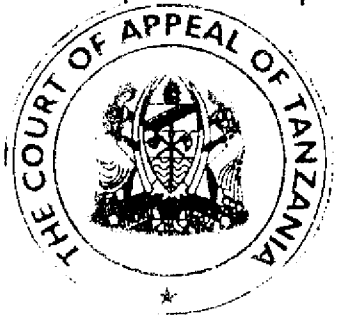
DATED at **DAR ES SALAAM** this 22nd day of April, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 29th day of April, 2022 in the presence of Mr. Charles Tibekebuka, Principal Officer appeared for the Appellant and Respondent present in person is hereby certified as a true copy of the original.



G.H. HERBERT
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