IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., KOROSSO, J. A And MWANDAMBO, J.A,)

CIVIL APPEAL NO. 12 OF 2020

BRIGHT TECHNICAL SYSTEMS & GENERAL SUPPLIES LIMITED .....APPELLANT

VERSUS

INSTITUTE OF FINANCE MANAGEMENT .....RESPONDENT

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

(Philip, J.)
dated the 4th day of October, 2019
in
Commercial Case No. 114 of 2018

JUDGMENT OF THE COURT

13th February & 30th May, 2023

MWANDAMBO, J.A.:

The appellant sued the respondent before the High Court (Commercial Division) sitting at Dar es Salaam in a suit in which it claimed mainly, a sum of TZS 102,920,247.00 allegedly as balance for services rendered and material supplied to her. The trial court (Phillip, J) allowed only a small part of the claim rejecting the rest for being unsubstantiated. From that decision, the appellant has instituted the instant appeal.

The facts which triggered the institution of the suit before the trial court have a genesis from an oral service agreement for installation and

maintenance of air conditions at the respondent's college dating back several years prior to 2010. Culled from the plaint and the witness statement of the sole witness for the appellant, the arrangement under the oral agreement was such that, the respondent would issue Local Purchase Orders (LPOs) or service memos to the appellant for specified services or supply of material to be followed by performance of such service or supply of material. Afterwards, the appellant would raise tax invoices corresponding with the particulars in the LPOs/services specifying the amount payable. It is also gleaned from the record that; the invoices would be accompanied by the relevant LPOs/service memos and delivery notes before the respondent could process payment of the invoiced amount.

The arrangement appears to have gone smoothly until September, 2013 when the respondent is claimed to have failed to settle the appellant's invoices for a total sum of TZS 230,504,648.00 as of 08/09/2013. That prompted the appellant to write a letter dated 09/09/2013 (exhibit P1) demanding payment of the amount claimed followed by another one on 21/07/2015 vide exhibit P2. By its letter dated 18/09/2015 (exhibit P3), the respondent acknowledged receipt of the demand admitting to be owed part of the amount on the outstanding invoices to the extent of TZS. 110,025,606.00 on which there was proof

of supporting documents. Through that letter, the appellant was requested to submit documents in support of the balance of TZS 102,920,247.00 by way of invoices, LPOs and delivery notes for verification. In the meantime, the respondent prepared a payment schedule for the amount admitted to be outstanding as shown in an internal memo (exhibit P5) dated 01/10/2015.

It is common cause that, the respondent liquidated its liability on the amount admitted to be payable as acknowledged by the appellant in her letter (exhibit P4) dated 11/05/2016. As for the balance on which proof was required, it was on the same date when the appellant submitted copies of the "*supporting documents*" for verification as requested. For reasons not apparent on the record, the respondent did not acknowledge receipt of that letter let alone pay that amount or any part thereof notwithstanding several demand letters to that effect. By reason of such stalemate, the appellant instituted the suit claiming not only the principal sum, but also, interest, general damages and costs.

Although the respondent filed a written statement of defence disputing the claim, the trial court struck out that defence due to a default to appear for the final pretrial conference; a course sanctioned by rule 31 (1) (b) of the High Court (Commercial Division) Procedure Rules, 2012 as

amended by G.N. No. 107 of 2019. Consequently, the suit proceeded for *ex-parte* hearing through a witness statement of the appellant's Managing Director (PW1) supported by eight documentary exhibits comprising, correspondences between 2013 and 2018 along with copies of various documents namely; tax invoices, LPOs/service memos and delivery notes.

The trial court determined the suit on two issues namely; whether the respondent was indebted to the appellant and if so, to what extent. The second one was on the reliefs.

Notwithstanding the fact the suit proceeded *ex-parte*, the appellant's suit succeeded only in part because the trial court found copies of the supporting documents meant to support payment of the balance as requested by the respondent wanting in one respect or the other except three of them for a sum of TZS 678,500.00 which it found to be duly supported by valid LPOs, tax invoices and delivery notes. It thus entered judgment for that amount plus interest and costs dismissing the rest of the claim.

Represented by M/s. Mnyele, Msengezi & Company Advocates as they did before the trial court. The appeal is upon eight grounds raising a range of complaints but all revolving around faulting the trial court for not

finding that, on the evidence, the appellant discharged her burden of proof in support of the amount claimed.

The learned counsel for the parties filed written submissions ahead of the date of hearing and each made oral arguments at the hearing of the appeal. Mr. Gabriel Simon Mnyele, learned counsel appeared for the appellant while, Mr. David Kakwaya, learned Principal State Attorney, represented the respondent.

We note with some reservations that even though the findings of the trial court arose from just one main issue, the appellant challenges the impugned judgment on eight grounds of appeal as alluded to earlier. As we observed in **Heritage Insurance Company Ltd v. First Assurance Company Limited,** Civil Appeal No. 165 of 2020(unreported), litigants and their advocates are under a duty to be focused in presenting their cases on real and decisive issues as opposed to peripheral and irrelevant matters. An appreciation of rule 93(1) of the Rules would have been helpful in the preparation of the grounds of appeal and limit the grounds on relevant and decisive issues only. Having examined the judgment, the determination of the appeal turns on ground one. In our view, the rest of the grounds are, but details revolving around the same complaint. Indeed, it is not surprising that, by and large the

arguments are similar in many respects but the decisive issue lies in ground one. We shall approach the appeal from that perspective because we do not think the determination of the appeal necessitates addressing each of the grounds in the memorandum of appeal based on the submissions placed before us.

The complaint in ground one is that the trial court made an error in not finding that the appellant discharged her burden of proof on the preponderance of probabilities entitling her to a judgment on the whole amount claimed in the plaint. Not surprisingly, the learned counsel are at loggerheads regarding the trial court's findings. The learned advocate for the appellant argues in both his written and oral submissions that the trial court strayed in its finding and invited the Court to hold that the appellant proved her claims the Court since, (1) she complied with the respondent's request vide exhibit P3 by sending documents contained in exhibit P4, (2) despite receipt of exhibit of P4, the respondent kept quiet neither did she question authenticity of the contents even after the appellant had sent reminders and demand notes thereafter nor challenge them in defence or in cross examination during the trial and (3) the trial court overindulged itself in a verification exercise worse still *suo motu* in the absence of contrary evidence from the respondent thereby arriving at erroneous findings. Counsel invites the Court to re-evaluate the evidence on the

record by way of copies of the documents in exhibit P4 and reverse such finding resulting into a holding that the appellant proved her case on the required standard.

Mr. Mnyele reinforced his submissions with a number of decided cases on what it entails by proof on balance of probabilities particularly; **Miller v. Minister of Pensions** [1947] 2 All. ER 372 from which he excerpted a statement by Lord Denning for the proposition that the court should enter judgment in favour of a party whose evidence has a reasonable degree of probability than the other. Similarly, he called to his aid the Court's decision in **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported) in which the Court underscored the requirement behind section 110 (1) of the Evidence Act on what it takes for a party with a burden of proof to discharge it.

Under the premises, counsel argues that the appellant met the threshold since, to prove that the documents submitted to the respondent established the claim, the respondent went as far as preparing a payment schedule vide exhibit P5 but it still failed to pay the amount claimed despite several demands. However, this part of the submission is, with respect, misconceived because, exhibit P5 had no correlation with the amount claimed in the suit. It is plain that exhibit P5 was prepared on

01/10/2015 after the respondent had sent exhibit P3 long before the receipt of exhibit P4. Besides, the amount involved in exhibit P5 is TZS 110,033,706.00 more than the amount claimed in the suit.

The essence of the respondent's submissions were; one, that the trial court rightly found that the documents submitted by the appellant did not substantiate the claim as they were largely not only too general to support the claim but also unauthentic hence the trial court's substantial rejection of the claim. To reinforce his argument, Mr. Kakwaya cited our previous decision in **Leonard Dominick Rubuye t/a Rubuye Agrochemical Supplies v. Yara Tanzania Limited**, Civil Appeal No. 219 of 2018 (unreported) for the proposition that, unexplained bundle of documents need not be considered. Two, the fact that the appellant tendered exhibit P4 did not mean that the trial court could have acted on it without examining its contents to satisfy itself that they passed the probative value in support of the claim and upon such examination, it found the documents wanting, hence rejecting them except three of them which it found to be genuine. Three, the absence any defence from the respondent did not automatically entitle the appellant to judgment upon *ex-parte* hearing of the suit on the authority of a decision of the Supreme Court of Uganda in **Mutekanga v. Equator Growers (U) Ltd** [1995-98] 2 EA 219 neither did the respondent's silence upon receipt of exhibit

P4 constitute admission of the claim. He thus urged the Court to sustain the trial court's finding as justified.

Mr. Mnyele took issue with the respondent's attorney in rejoinder on the application of **Lubuye**'s case (supra) arguing that, the appellant discharged the obligation by providing all required documents which were self-explanatory and impeccable and so did not require any oral explanation.

Having examined the submissions by the learned counsel for the parties in the light of the main issue in this appeal, we wish to begin our discussion with the obvious; matters which are not in dispute with or without any defence. First and foremost, there is hardly any dispute that in response to the appellant's demand letter dated 09/09/2013 (exhibit P3), the respondent admitted liability in the sum of TZS. 110,025,606.00 as due and payable. The balance of 102,920,247.00 was found to be lacking in supporting documents by way of invoices, LPOs and delivery notes. It is equally not disputed that, the respondent made an undertaking to pay the balance upon verification of the relevant supporting documents for which, the appellant was requested to submit to the respondent documents with a view to processing payment. The appellant did so after eight months but the respondent could not act on it.

The appellant criticises the trial court for not finding that, since the respondent did not challenge the documents submitted in support of the claim neither did it enter defence and controvert them during the trial, the appellant discharged her burden of proof and judgment ought to have been entered in her favour on the whole amount. We shall preface our deliberation with addressing the burden and standard of proof.

We have no qualms with the authorities cited to us by Mr. Mnyele particularly **Miller v. Minister of Pensions** (supra) from which the learned advocate excerpted a statement by Lord Denning for the proposition that the court should enter judgment in favour of a party whose evidence has a reasonable degree of probability than the other. The second is our decision in **Paulina Samson Ndawavya v. Theresia Thomas Madaha** (supra) in which the Court underscored the requirement under section 110 (1) of the Evidence Act on what it takes for a party with a burden of proof to discharge it. These decisions, and many others we need not cite here, provide a general framework from which the court can act in deciding a particular case.

Needless to say, counsel's argument that the trial court ought to have found the claim sufficiently proved since the claim was uncontroverted may appear to be logically correct but legally untenable.

It is our firm view that, owing to the nature of the claim, the appellant was required to prove that it rendered the services and or supplied goods to the respondent upon request/instructions on agreed sums of money which remained unpaid. To achieve that, the appellant was bound to lead evidence of the existence of instructions for rendering services or supply of goods by way of LPOs/service memos, delivery notes and tax invoices. That became necessary considering that, payment of that sum was subject to the appellant submitting supporting documents for verification to enable the respondent process payment upon being satisfied that such documents did indeed support the claim.

The foregoing should be elementary to the counsel for the appellant considering our decision in **Paulina Samson Ndawavya** (supra) in which the Court was emphatic that, the burden of proof on a party who alleges existence of a fact is not diluted by reason of the weakness of the opponent's case; in this case, the absence of a written statement of defence and evidence from the respondent. Undeniably, the decision of the Supreme Court of Uganda cited to us by the respondent's attorney in **Mutekanga v. Equator Growers (U) Ltd** (supra) to which we subscribe, underscored the time-honoured principle that, a party on whom the onus lies has a duty to prove his case on balance of probabilities, even where the case proceeds *ex-parte,* as it were. That principle is reflected

in some of the decisions of the High Court particularly; **National Bicycles Company Limited v. Shanghai Phoenix Imports and Exports Company Limited,** HC (Dsm) Civil Case No. 58 of 2010 and **Abdallah Sozigwa and Another v. Hashim Haruni Abdallah,** HC (Dsm) Civil Case No. 23 of 2012 (both unreported). The High Court has repeatedly stated that, the fact that a suit proceeds by *ex-parte* proof does not mean that the plaintiff's burden of proof is thereby diluted.

What it means by the above is that the court must be satisfied that the plaintiff has discharged his burden of proof on the required standard before entering judgment in his favour. It is trite as expressed in **Co-operative and Rural Development Bank v. M/s Desai & Co. Limited**, Civil Appeal No. 51 of 1999 (unreported), the burden of proof in civil cases never shifts to the other party unless the party on whom it lies has discharged his relative to the matter to be proved. This will explain why the trial court did not enter judgment for the appellant as claimed regardless of the fact that the suit proceeded *ex-parte*. It performed its role of evaluating the evidence before it that is the witness statement and the documentary exhibits in support of the claim, mainly; exhibit P4. Whether the trial court was right or not in its outcome is a different thing altogether. Suffice to say that as we are sitting on a first appeal, we shall

re-evaluate the evidence on record ourselves and make our own findings as urged by Mr. Mnyele to which we now turn:

Our starting point is exhibit P1 to which the appellant attached a schedule showing a list of outstanding sums for which LPOs/service memos had not yet been issued amounting to TZS 127,983,241.00 as evident at pages 195 and 196 of the record of appeal. Nevertheless, the appellant did not challenge the respondent when she required her to submit tax invoices with supporting LPOs/service memos vide exhibit P3. The title to the letter forming part of exhibit P1 shows that the claim was for a sum of TZS. 230,504,648.00 up to 08/09/2013. That letter made reference to two previous letters; Ref. Nos. BTS/GSL/IFM/2013/7/599 dated 30/7/2013 and BTS/GSL/08/2013/65 but no date is indicated in the latter. All the same, the appellant intimated to the respondent that a claim for TZS. 127,983,241.00 had no LPOS while a claim of TZS. 102,521,407.00 had the relevant LPOs. A schedule of the works done without LPOs was attached to that letter. On 21/7/2015, the respondent vide its letter Ref. No. IFM/BDE/0805/Vol. IX titled: "Outstanding Tax invoices" made reference to the appellant's unreferenced and undated letter received on 06/07/2015 acknowledging existence of several outstanding invoices awaiting payment as soon as it received funds from the government. That letter was followed by another letter dated

18/09/2015 (part of exhibit P3) whereby, the appellant attached a list of invoices in three categories; **one;** paid invoices amounting to TZS. 92,821,216, **two**, unpaid invoices amounting to TZS. 110,025,606.00 and 49 invoices in the sum of TZS. 102,920,247.00 claimed to be unpaid but without supporting documents for which, the appellant was asked by the respondent to submit copies of LPOs, invoices and delivery notes for verification to enable her process payment.

The appellant reverted to the respondent a period of close to eight months, on 11/05/2016 to be exact, with exhibit P4 enclosing a booklet which it referred to as full particulars of the outstanding balance of TZS 102,920,247.00. It is this booklet from which the trial court singled out three invoices which it found to be responsive of the respondent's letter of 18/09/2015.

It is plain from the record that, according to the appellant's demand vide exhibit P1, the entire claim of TZS. 230,504,648.00 related to the period up to 08/09/2013 out of which the appellant admitted part of it (TZS.110,025,606.00) was payable. A sum of TZS. 102,920,247.00 was subject to submission of supporting documents for the respondent's verification and that was the case pleaded in the plaint. The appellant was bound to prove that claim up to that date through tax invoices,

LPOs/service memos and delivery notes or corresponding to that period. Unlike Mr. Mnyele, in line with the Court's decision in **Rubuye**'s case, the appellant's burden of proof could not be said to have been discharged by the mere submission of exhibit P4 without more regardless of the absence of any defence from the respondent. The appellant was bound to go some steps further and in fact, the trial court had to be satisfied that the appellant actually discharged her duty. This had to be done by the evaluation of the evidence relative to the amount claimed on the case pleaded by the appellant. Out of that process, the trial court found three invoices to be genuine fully supported by LPOs/service memos and delivery nots, No. 3943,5669 and 5670 with an amount of TZS. 678,500.00.

Upon our evaluation of the evidence through exhibit P4, we note that the claim is surrounded by three features, namely; one, seven invoices with complete supporting documents which account for an amount of TZS. 3,171,056.00; two, 33 invoices without LPOs, service memos, as the case may be constituted by tax invoices Nos. 2299, 2301, 2302, 2304, 2305, 2313, 2314, 2315, 2316, 2317, 2319, 2326, 2330, 2331, 2333, 2334, 2335, 2336, 2339, 2340, 2536, 2537, 2538, 2902, 2903, 2904, 2906, 2907, 2908, 2912, 2912, 2916 and 2917. In that list, 20 of them are invoices issued beyond 08/09/2013 per exhibit P1

comprised by Tax Invoice Nos. 2299, 2301, 2302, 2304, 2305, 2323, 2314, 2315, 2316, 2317, 2319, 2326, 2330, 2333, 2334, 2335, 2336, 2340, 2331 and 2339. These account for a sum of TZS. 71,285,393.00. The rest of the invoices accounting for TZS. 28,463,798 involve claims within the period up to 08/09/2013 but without the supporting LPOs/service memos and delivery notes. On the whole, from that evidence, we are satisfied that the appellant discharged her burden of proof for a claim of TZS. 3,171,056.00. This is the amount which was payable to her. The rest of the claim was either lacking in supporting documents or falling outside the cut-off point; 08/09/2013 in accordance with exhibit PI consistent with the appellant's pleadings in para 4 and 6 of the plaint by which she was bound. That means that, had the trial court approached the evidence in the manner we have done, it should have found that the appellant proved her case to the extent of a claim of TZS. 3,171,056.00. To that extent, the trial court's finding that the appellant proved her claim for TZS. 678,500.00 is set aside and substituted with a finding that the appellant's case was proved to the extent of TZS. 3,171,056.00. In the upshot, ground one succeeds only in part to the extent indicated.

In fine, the appeal succeeds only to the extent indicated that is to say; the appellant proved her case on the amount of TZS. 3,171,056.00

payable with interest at 20% per annum from the date of filing the suit to the date of judgment and thereafter an interest at 7% per annum till full and final satisfaction. As the appeal has been successful only in part, the appellant shall have 50% of the costs in this appeal.

DATED at **DAR ES SALAAM** this 26th day of May, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 30th day of May, 2023 in the presence of Mr. John Mnyele, learned counsel for the Appellant and Ms. Caroline Lyimo and Ms. Victoria Lugendo, learned State Attorneys for the Respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL