IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., GALEBA, J.A., And MGONYA, J.A.)

CIVIL APPEAL NO. 455 OF 2020

CRESCENT IMPEX (T) LIMITED.....APPELLANT

VERSUS

MTIBWA SUGAR ESTATES LIMITED..... RESPONDENT

[Appeal from the Judgement and Decree of the High Court of Tanzania (Dar es Salaam District Registry) at Dar es Salaam]

(Mgaya, J.)

dated the 1st day of April, 2016

in

Civil Appeal No. 53 of 2010

.....

JUDGMENT OF THE COURT

19th July & 16th August, 2023

MGONYA, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Dar es Salaam (Dar es Salaam District Registry) dated 1st April, 2016 in Civil Appeal No. 53 of 2010 arising from Civil Case No. 97 of 2003 in the Resident Magistrates' Court of Dar es Salaam at Kisutu. The appellant, Crescent Impex (T) Limited who was the respondent in the High Court have knocked the doors of this Court for redress.

Brief facts of this matter as gathered from the record of appeal go as follows: Before the trial court, the appellant (plaintiff in the original matter) instituted proceedings against the respondent (defendant in the original matter) claiming for payment of TShs. 84,838,360/= and interest thereon being the purchase price of genuine PTFE imported impregnated asbestos plaited parking with Lubricant High Quality TBA 23L/6M and spare parts for a caterpillar 3304 D1 Engine (the PTFE Materials) delivered by the appellant to the respondent worth 15,054,000/=, interest thereon and general damages for the respondent's breach of contract.

After hearing, the trial court entered judgment in favour of the appellant. Being aggrieved, the respondent herein who was the appellant in the first appellate court lodged the appeal equipped with ten grounds of appeal to challenge the trial court's judgment via Civil Appeal No. 53 of 2010 before the High Court. The first appellate court heard the parties and finally decided the matter in favour of the respondent. Irked with the decision, the appellant lodged the instant appeal before this Court.

At the hearing of the appeal, the appellant was represented by Mr. Protace Kato Zake learned advocate, while the respondent had the services of Mr. Ruben Robert, learned advocate and Ms. Elizabeth John Mlemeta also

learned advocate. The memorandum of appeal comprised four grounds of appeal. We take liberty to reproduce the same as hereunder:

1. *That, having regard to the evidence on record and the circumstances of the case, the learned appellate Judge grossly misdirected herself in holding that there was an oral contract agreement that the price of PTFE materials was Tshs. 23,000/= per kilogram and not Tshs. 494,950/= per kilogram without any evidence to support her finding;*
2. *That, having regard to the fact that there was no dispute that the applicant was claiming Tshs. 494,950/= per kilogram, the learned appellate Judge grossly misdirected herself in fact and in law in relying on the absence of the exhibits in determining the appeal in favor of the respondent;*
3. *That, having regard to the evidence on record and the circumstances under which the respondent ordered the PTFE materials from the appellant, the learned appellate Judge erred in fact and in law in failing to apply the principle of Caveat Emptor in favor of the appellant; and*
4. *That, the appellate Judge sitting as the first appellate court, grossly misdirected herself in fact*

and in law in failing to analyse the whole evidence as adduced before the trial court in particular by the appellant and in failing to consider the submission made before her on behalf of the appellant who was the respondent.

Both parties complied with the requirements under rule 106 of the Tanzania Court of Appeal Rules, 2009 (the Rules) by filing their respective written submissions for and against the appeal; whereby numerous and useful decisions of this Court and beyond were cited in support of their respective positions. While we have endeavoured to review and to consider them all, we shall not necessarily make reference to all the authorities referred to us.

We shall commence with the first and second grounds of appeal. Mr. Zake stood by his written submissions and moved the Court to adopt the same and form part of his submission. Submitting in supporting the first and second grounds of appeal which bear a resemblance, it was Mr. Zake's contention that the learned first appellate Judge misdirected herself in holding that the price of the PTFE materials was Tshs. 23,000/= per kilogram and not Tshs. 494,950/= without evidence to support her findings. The learned counsel further submitted that, the appellant categorically stated

that the agreement between the parties was verbal and written where the respondent agreed to the price of Tshs. 494,950/= per kilogram hence the regular respondent's supplier Flecher Smith of UK delayed delivery. Further, that upon delivery, the respondent is said to have never disputed the price shown in the invoices which were attached to the plaint though the same were not tendered and admitted before the court. It was the appellant's counsel submission that, since the respondent entered into that arrangement willingly, the said conduct of the parties demonstrated by implication that the agreed price was Tshs. 494,950/= per kilogram.

Along the same line of argument, it was the appellant's counsel submission that the said price of Tshs. 23,000/= per kilogram was according to the respondent's proposal which was yet to be confirmed by the parties.

Concluding on the two grounds, Mr. Zake submitted that the determination in the first appeal favouring the respondent was a result of a total misdirection in fact and law of the appellate Judge relying on the reason of absence of exhibits as evidence to support the appellant's case.

Responding to the above two grounds of appeal, Mr. Robert, apart from praying the respondent's written submission to be adopted as part of his oral submissions, he submitted that the High Court did not err in its

decision as the annextures that the trial court relied on in making its decision were never tendered before the court and admitted as exhibits. The learned advocate further submitted that it was wrong for the trial court to rely on the said untendered invoices as evidence in favour of the respondent. In support of his assertion, he cited the case of **Sabry Hafidhi Khalfan v. Zanzibar Telecom Ltd. (Zantel) Zanzibar Civil Aviation** Civil Appeal No. 47 of 2009 (unreported).

In his further submission, the learned advocate contended that the Court on various occasions has emphasized that, in a civil case, adducing evidence is important in supporting the claim. That, credible witnesses and reliable documentary evidence are important in assessing the evidence brought before the trial court.

Expounding further on the uncertainty of the prices mentioned by the appellant to be Tshs. 495,500/- instead of Tshs. 23,000/= per kilogram of the imported materials, it was the respondent's assertion that the appellant's price of Tshs. 495,500/= per kilogram was never communicated to the respondent. Further, the counsel submitted that the appellant on the other

hand, failed to establish how Tshs. 495,500/= per kilogram was reached and agreed by the parties.

On the issue of conduct and customs of the parties to their agreement as submitted by the appellant to justify her agreement on prices, it was the respondent's concern that as well pleaded by the appellant, the agreement between the parties was both oral and written. However, the appellant failed to establish his assertion in this regard. From the above, Mr. Robert prayed the Court to dismiss the two grounds of appeal as they are meritless.

Having read and heard the submissions from the parties' advocates, in determining the first two grounds of appeal, notably, it is not in dispute that, the parties agreed verbally that the appellant should supply the respondent with the raw materials and spare parts for the respondent's factory. This fact is well supported by the act of supply by the appellant and receipt of the said materials by the respondent. The dispute here lies on the price of the materials in issue. While the appellant claims that the price was Tshs. 495,950/= per kilogram; the respondent claims that they verbally agreed the price to be Tshs. 23,000/= per kilogram as that was the market price.

On those premises, the applicant who was the plaintiff before the trial court had a legal burden to adduce sufficient evidence to answer the

distressing issue of the two prices as seen above. At the hearing, the trial court framed five issues, one of them was whether there was an agreed price in the supply of the materials supplied by the plaintiff to the defendant, which is still a valid issue in this appeal. Therefore, as there were two prices claimed by the parties which was Tshs. 495,950/= and Tshs. 23,000/= per kilogram, it was the duty of the Plaintiff to prove that the price was indeed Tshs. 495,950/= as he alleges.

Going through the record, the appellant in her plaint averred that there was verbal and written agreement. During trial, when the sole witness for the appellant was testifying particularly during the cross-examination, the witness testified that, parties verbally agreed that the appellant would supply materials at a price of Tshs. 495,950/= relying on the invoices annexed to the plaint which were never tendered and admitted as evidence before the court.

We have also gone through the proceedings and the judgment of the High Court, where the learned first appellate Judge re-evaluate the evidence. The High Court's finding was that the appellant did not prove his case to the required legal standards as there was no evidence to prove that the parties had by conduct and custom agreed the purchase price to be Tshs. 495,950/=

per kilogram. In the judgment of the first appellate court at page 260 of the record of appeal, it was been observed that throughout his evidence, PW1 did not tender any exhibit be it a delivery note or invoice to support his alleged verbal agreement. However, the trial Magistrate based on the invoices annexed to the pleadings proceeded to consider them as evidence for the appellant to support his claim.

It is trite law that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R. E. 2022]. However, in the course of submission, we have noted that the appellant who was the main complainant at the trial court tried to shift this burden to the respondent, the defendant at the trial court. We are aware that the distinction between burden of proof and onus of proof as a matter of law and pleading as a matter of adducing evidence is essential. Though the form of issue may cast the burden on the defendant, however, the form cannot affect the burden of proof on the pleadings which is on the plaintiff. See the Indian case of **Parukkutty v. S, A** 1962 [K93] and **Sakar on Evidence in India, Pakistan, Bangladesh, Burma & Ceylon,** 14th Edition 1993 by Sudipto Sarkar & V R Manohar, 14th Edition at page 1338 where the above prominent author had this to say:

> *"An essential distinction between the burden of proof and onus of proof is that the burden of proof never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."*

It is also elementary that the standard of proof, in civil cases, is on a balance of probabilities which means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. Likewise, it is the law that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/her burden to prove and the said burden is not discharged or diluted on account of the weakness of the opposite party's case.

In the case of **Paulina Samson Ndawavya vs. Theresia Thomas Madaha,** Civil Appeal No. 45 of 2017 (unreported), it was observed that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. The Court was fortified by the extracts from the celebrated works of Sarkar on the Indian Evidence Act, 1872 largely borrowed by the Tanzania Evidence Act, Cap. 6 [R. E. 2002] (the Evidence Act). We take liberty to, once again, reproduce the relevant

passage from *Sarkar's Laws of Evidence, 18th Edition M. C. Sarkar, S. C. Sarkar and P. C. Sarkar, published by Lexis Nexis at page 1896 as below:*

> *"...**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 are still of the same view in the instant appeal; indeed the appellant under the given circumstances is the one having the burden to prove his assertion that the agreed price to supply the materials was Tshs. 495,950/= per kilogram. There is a long list of authorities to that effect. To mention a few, are: **Habiba Ahmadi Nangulukutu & Others v. Hassaniausi Mchopa (The Administrator of the Estate of the late Hassan Nalino)**

& Another, Civil Appeal No. 10 of 2022 (unreported) and **North Mara Gold Mine Limited v. Emmanuel Mwita Magesa** (Civil Appeal 271 of 2019) [2022] TZCA 442 (18 July 2022) TanzLII.

Having gone through the record of appeal, one of the crucial issues that must be settled and determined particularly in these two grounds of appeal is the admission of documentary evidence or otherwise which was heavily relied on by the trial court in composing its judgment. The record bears out that the trial court relied on the invoices which were annextures to the plaint though not admitted by the court as evidence, the fact which was not disputed, even by the appellant's counsel.

We have gone through the appellant's written submissions in respect of these two grounds of appeal. With respect, we have failed to understand the counsel for the appellant up to this stage of appeal still seriously referring to the annexed invoices as evidence to pronounced price of Tshs. 495,950/= per kilogram, while it is in his knowledge that the said invoices were not admitted in evidence. This is so hence the said untendered invoices all the way in his submission was taken as evidence to support the appellant's claims. It has been confirmed in this case that, invoices to this matter were

only annexed to the plaint and not tendered by the relevant witness. So, it obvious that the said invoices cannot be termed as evidence.

The law is very clear on the weight of annextures which were not tendered and received as exhibits during trial; that they should not be treated as evidence. See; **Sabry Hafidh Khalfan v. Zanzibar Telecom Ltd (ZANTEL) Zanzibar,** Civil Appeal No. 47 of 2009, (unreported) where this Court had this to say at page 9:

> *"We wish to point out that annexures attached along with either the plaint or written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents either to the plaint or to the written statement of defence is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annextures are not evidence".*

Again, this principle was emphasized in the case of **Shemsa Khalfa And Others v. Suleiman Hamed Abdalla,** Civil Appeal No. 82 of 2012, (unreported). We stated in the said case that:

> *"At this juncture, we think our main task is to examine whether it was proper for the trial court and*

other subsequent courts in appeals to rely upon, in their judgments, the said document which was not tendered and admitted in court. We are of the considered opinion that, it was improper and substantial error for the High Court and all other courts below in the case to have relied on a document which was neither rendered nor admitted in court as exhibit. We hold this to be a grave miscarriage of justice."

It appears to us that it is the agreed price which is the genesis of this appeal. Therefore, there is no any other choice than to rely on the principle that, the best available evidence must always be pleaded and admitted, and that all facts except the contents of the documents are to be proved by the production of the documents themselves; or in their absence by the secondary evidence as provided under section 66 and 67 of the Evidence Act. Apart from the appellant's failure to tender the annexed invoices in the plaint to support her case, we have seriously considered whether we could locate the written agreement as evidence as pleaded and testified by the appellant's witness. However, we have failed to trace any written agreement to support the appellant's case to that effect. It has to be taken into account also that parties are bound by their own pleadings as was emphasized by

this Court in the case of **Maria Amandus Kavishe v. Norah Waziri Mzeru and Another**, in Civil Appeal No. 365 of 2019 (unreported) that:

> *"We also feel compelled, at this point, to restate the time-honoured principle of law that* ***parties are bound by their own pieadings and they cannot be allowed to raise a different matter without amendments being properly made. That, no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded.*** *Furthermore,* ***the court itself is as bound by the pleadings of the parties as they are themselves*** *-"*[Emphasis added].

In the event therefore, in our well-considered opinion that, since the appellant has failed to prove his alleged price on the required standard, there is no justification to fault the findings by the learned first appellate Judge. We thus find these two grounds of appeal to have no merits as the alleged price was not proved by the appellant.

Submitting on the third ground, Mr. Zake drew our attention to the point that the respondent is bound by the business warning of "*Caveat Emptor*" as she readily accepted the materials supplied and used them. The

appellant's counsel emphasizing on this point contended, under the circumstances where the respondent is already in receipt of the materials supplied by the appellant, the respondent cannot now turn back and fix her own price after consuming the said materials and the other materials unpaid for but supplied to her. The learned counsel insisted that, there was an outright sale at a known agreed price and the respondent cannot be heard at this stage saying that the goods were tagged at a very high price under the principle of *Caveat Emptor*. It is the appellant's counsel contention that, had the learned first appellate Judge applied this principle, she could not have reached the decision which is now subject of this appeal.

Responding to this ground of appeal, it was the respondent's position that, as correctly decided by the learned first appellate Judge, the respondent had successfully proved that the agreed price was Tshs. 23,000/= per kilogram, and that the 29 million Tanzania Shillings undisputedly paid to the appellant covers all the deliveries agreed by the parties. Moreover, on the other hand, the appellant had failed to prove that the agreed price was Tshs. 495,950/= per kilogram, after basing his arguments on unadmitted documents before the court.

From the above submission, it was the respondent's counsel argument that the principle of *caveat emptor* cannot stand as the said doctrine warns the buyer to be conversant with the details of an agreement before committing to its terms. The reason given is that the evidence before the trial court shows that the buyer did not communicate with the appellant the price of Tshs. 495,950/- per kilogram; which is said to be the agreed price to both parties and whereas the appellant also failed to prove the alleged price.

Further advocating for the respondent, it was Mr. Robert's concern that, the issue of *caveat emptor* was never raised both in the trial court and before the first appellate court. Hence, this Court cannot accommodate the same at this second appeal.

We are well aware of a Latin phrase "*Caveat Emptor*" means buyer beware. It basically conveys the message that the buyer must protect his or her interest when making a purchase or transaction. The buyer ought to have obtained all available information before she finalizes the purchase. Under this doctrine, it is the buyer's responsibility to examine the risks of the contract. However, there are a number of exceptions to the doctrine of *Caveat Emptor*. The same includes but not limited to the following: If there

is no explicit warranty regarding the product's quality, then it is the buyer's responsibility to gather all the information about the purchased product. At the same time, the seller must not misrepresent the product or provide the buyer with false information about the product.

Having discussed albeit in brief, the application of the doctrine of *caveat emptor*, we now turn to the applicability of the same in this appeal. In his submission in support of this ground of appeal, the appellant's counsel submitted that the learned first appellate Judge failed to apply the Principle of *Caveat Emptor* in her favour as there was no dispute that the appellant was ordered by the respondent to supply PTFE materials. By referring to the evidence of PW1 adduced before the trial court, he argued that there was emergence as the usual manufacturer one Fletcher Smith had failed to supply the materials in time at the price of Tshs. 23,000/= per kilogram. Hence such price was determined by the said emergence. The appellant's counsel submitted further that, the parties relied on their custom and conduct to prove the price. He went on to contend that, the respondent had started paying the appellant for that service about Tshs. 29,046,050/= hence is bound by the business warning of *Caveat Emptor* and she cannot now turn back and fix her own price after consuming the said materials.

On the other side the respondent's counsel responded that, the respondent has done the most to show that the price agreed was Tshs. 23,000/= per kilogram while the appellant has failed to establish how Tshs. 495,950/= per kilogram was agreed and reached by the parties. He argued further that, the appellant received a total of Tshs. 29,406,040/= which is more than the payment required to cover the whole costs of the supplies.

Our analysis on this ground is, from the parties' testimony it is clear that, it was the first time for the appellant to supply the respondent with the said raw materials. Therefore, it was the respondent who had the knowledge of the same as she used to buy them from the manufacturer. Observing from the trial court's proceedings, when PW1 was under cross examination, he responded that, he didn't know where and at what price he would get the said materials. It is from those facts we are persuaded to believe that, since the appellant failed to prove the allegation that, they agreed to supply the raw materials for Tshs. 495,950/= per kilogram, then it is Tshs. 23,000/= stated to be the market price by the respondent which seems to have been agreed by the parties.

All said and done, the Latin phrase that let the buyer beware cannot be a basis for the court to decide the appeal in the appellant's favour. Hence this ground of appeal is destitute of merit.

In the fourth ground of appeal, the appellant is claiming that, the appellate Judge sitting as the first appellate court, grossly misdirected herself in fact and in law in failing to analyse the whole evidence as adduced before the trial court in particular by the appellant and in failing to consider the submissions made before her on behalf of the appellant who was the respondent.

While submitting in support of this ground, the appellant's counsel stated, if this Court will re-visit the evidence and submission of the parties in the lower court and first appellate court, it will establish that the evidence adduced by the appellant was not analysed and submission by the appellant was not considered at all.

On the other side, the respondent's counsel admitted that, the appellate Judge did not take into account the submission of the appellant because it did not hold any water. He stated that the appellate Judge did not find anything substantial as the appellant kept on insisting that the price was Tshs. 495,950/= despite acknowledging her failure to tender the documents.

We have gone through the first appellate court's judgment and have noted that after narrating the background of the case, the learned first appellate Judge went on to refer to what was submitted by the counsel for the parties from both sides. From page 259 of the record of appeal the learned first appellate Judge indicated that she had performed her mandatory duty to re-evaluate the evidence of the trial court and proceeded to write her findings that, the trial court's decision was based on extraneous matters as there was no documentary exhibits tendered and admitted in evidence upon which she would rely.

Going by the proceedings, it is true that the appellant did not tender any document for admission as evidence before the court rather than referring to annextures in her plaint.

As the appellant has urged us to re-evaluate the evidence adduced at the trial court and the findings of the first appellate court, we do not accept the invitation because the first appellate court did not abdicate that duty. If anything, the first appellate court re-evaluated the evidence so well and, we think, it came to the right conclusion. However, in our respectful view, the Court cannot fault the first appellate court for the legal reasons stated above.

In the event, as all grounds of appeal have failed, we hold that the appeal has no merit and proceed to dismiss the same in its entirety with costs.

It is so ordered.

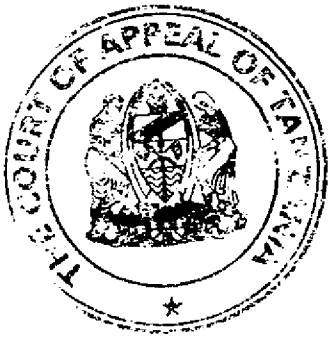
DATED at **DAR ES SALAAM** this 10th day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The judgment delivered this 16th day of August, 2023 in the presence of Mr. Theodore Primus, learned counsel for the Appellant and Mr. Ally Hamza learned counsel for the Respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL