

**IN THE HIGH COURT OF TANZANIA
AT MTWARA**

DC. CIVIL APPEAL NO. 1 OF 2012

Original Lindi District Court Civil Case No. 17 Of 2009

(Before Hon. D. B. Ndunguru, RM)

YUSUPU MTAALAM -----1ST APPELLANT
AMRI ABDALLAH JOROVA ----- 2ND APPELLANT
HAMIS HASSAN SIRI -----3RD APPELLANT
HASSAN SAID HAMIS -----4TH APPELLANT
HAMIS MOHAMED -----5TH APPELLANT

VERSUS

MOHAMED HAMISI TONGOLANGA

(Administrator of the Estate of ----- RESPONDENT

MOHAMED NANGUKA)

JUDGMENT

27th August, 2013 and 20th September, 2013

M. G. MZUNA, J.:

Yusufu Mtaalam, and 71 others, have lodged this appeal against Mohamedi Hamis Tongolanga (Administrator of the estate of the late Mohamed Nanguka), praying among others for payment of Tshs. 3,073,300/= being outstanding balance of account for the cashew nuts delivered to the deceased one Mohamed Nanguka but which was never paid for plus interest and costs of the suit.

The evidence of five appellants who represented their fellow appellants was in unison that during the season of 2006/2007 the deceased collected about 15 tones and 327 kilograms of cashew nuts

from the said appellants. The price was Tsh. 380/- per Kilogramme making a total of Tshs. 5, 824,260/-. He paid Tshs. 2,750, 960/- and therefore Tshs. 3,733,300/- remained as an outstanding debt. Unfortunately, he became ill and then passed away before fulfilling the agreed promise.

The first issue is whether there was evidence as against the deceased which entitled the appellants the reliefs sought?

The 1st and 3rd appellants relied on the annexed document to the plaint which shows that the deceased admitted to be indebted which was never taken into consideration in the judgment. That, the allegation that the respondent published notice for those who claimed against the deceased to go and claim is unfounded as he denied to have seen such publications. Further that there was the evidence of PW.3 and PW.4 whom they claim to be neutral parties but whose evidence were ignored by the magistrate.

In response, the respondent said that the appellants based on the chit left by the deceased which did not show the claimants who were paid and those that were not paid. He submitted that, the appellants admitted that even when the deceased passed away there was no cashew nut left and that they never took legal step. Further that they never tendered documents to support their claims which ordinarily ought to have been stamped by the VEO and or the police station.

The learned Magistrate in dismissing the suit found that though the appellants did conclusively establish the fact that the deceased was a cashew nuts dealer, however they failed to prove the exact amount which was left as outstanding in line with the plaint.

Now, the basis of their claim is based on the annexed document which purports to show that the deceased admitted to be indebted the claimed sum and that he promised to pay depending on what he earned. Throughout in this appeal during hearing, the appellants had in mind that it was misplaced which is not the case. However, that piece of paper which is never signed and it is not known the maker, was never tendered for cross examination. Even the date when it was so made is not shown.

The law is very clear that "annextures to the plaint are not exhibits in evidence". They can neither be relied upon as evidence nor can it be used as the basis of the decision. These profound words were illustrated in the case of **Abdallah Abbass Najim vs Amini Ahmed Ali** (2006) T.L.R 55 by Kihyo, J. I am in full agreement to that proposition.

In line with that proposition, the appellants forcefully said that there are two receipts (Exhibit P1) and a ledger book (exhibit P2) which conclusively proved their claim but were equally ignored. That can also be seen in their second ground of appeal.

It is true that nowhere in the judgment were these two documents referred to. I have also noted that the above mentioned documents were tendered as evidence in total defiance of the provisions of Order VII Rule 14 (1) and (2) of the Civil Procedure Code, Cap. 33 R.E 2002 which clearly stipulates that:

"14 (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in court when the plaint is presented and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

(2) Where the plaintiff relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint."

The documents (I.e. Exhibits P1 and P2) were not filed with the plaint let alone its list annexed thereto. There was not even leave of the court sought before being admitted. In so doing the other party was taken by surprise which is not the intention of the above cited provision.

In failing to refer them, the magistrate though he never specifically said so, has to some extent some justification based on the above law. However, there is a principle that once the court had admitted a document which forms part of the evidence, the court is not exempted from considering it. So this being the court of first appeal I will attempt to do so.

PW3 A bdallah Amri tendered the receipts which were used in transporting the cashew nuts (Exhibit P1) and a ledger book which was used in registering the sold kilograms (Exhibit P2). It was relevant

according to them to add weight to the evidence of PW1 Hassan Said, PW2 Yusuph Mtaalamu, PW.4 Said Bandari and PW5 Ismail Abdallah.

They said the deceased paid Tshs. 2,750,960/= as part of the claim and promised to pay the balance of Tshs. 3,733,300/= in October 2007 but passed away before effecting the payments. It was also the evidence of PW.2 Yusuph Mtaalamu that after noticing that the deceased never heeded to the promise, they started to look for his whereabouts only to find that he was admitted at Ndanda and was in a critical condition. They went there with the Police but there was no criminal case which was instituted against him before passing away.

But how relevant were the said receipts and ledger book in proving the second issue in the trial court that is; whether the deceased had or took cashew nuts of the plaintiffs on credit?

Starting with the receipts, they only showed the issue of transportation of cashew nuts which by itself does not connect the appellants with the claim against the deceased.

I go to the ledger book. It contains the names of the parties say the appellants inclusive, and bears their signatures and the difference between the amount paid vis a vis the balance due. Underneath is total amount of kilograms supplied for all parties, the amount paid and due as opposed to the actual claim.

One can pose here and ask, why is it that it is the appellants' names and signatures which appears while the name and signature of the deceased does not appear? Secondly, under whose custody was the document placed? All these questions had no answers reflected in the record. It is one thing to claim against somebody but it is another thing to prove the claim. In other words, there is no acknowledgment of the deceased on its truthfulness.

Further, I find it irrelevant to the fact in issue for the reason that the appellants never shown any agreement on the claim with the deceased. DW1 Mohamed Hamis Tongolanga was quite right when he said that there is no any agreement entered between the appellants and the deceased during his lifetime. The trial magistrate was right to find that the appellants never discharged the burden of proof albeit on the balance of probabilities. The evidence of PW.5 then a Secretary to the Mutua Primary Co-operative Society who said gave him the weighing scale and permit for transportation could not cure that defect.

Again, the allegation by the appellants during hearing of this appeal that it was wrong for the court to find that each individual should show the breakdown of what he/she claimed as each had a receipt as a member is never reflected in the judgment. To my view, it does not matter whether they possessed the receipts individually or a joint ownership. What they ought to have proved and which they never did is the acknowledgment of the claim by the deceased and or the agreement

showing what was paid as opposed to the amount due. None of the above exists.

I should say and this is I think the law (so far as local people living in the villages are concerned) in line with the proviso to the provisions of section 10 of the Law of Contract Act, CAP 345 R.E 2002 that where parties enter into a contract and an agreement is executed verbally it should be witnessed by Village Local Authorities. In the event that government personnel are not witnesses thereto, then relatives and non relatives should be witnesses. This is an alternative to where the agreement was never signed by the parties as the case under consideration.

The second condition if the above is fulfilled, the party claiming against the deceased should as soon as possible register his or her claim to the relatives or administrator of the deceased's estate after being informed of his/her death.

None of the above conditions which I consider as a condition precedent exist in the case under consideration.

The first issue is therefore answered in the negative that the appellants' never adduced cogent evidence as proof for the reliefs sought.

The second issue is whether this appeal should be allowed?

Since the claim by the appellants is based on the purported agreement with the deceased but which is never backed with evidence showing that the deceased admitted their claim, then this appeal is bound to fail. It is a one sided scenario while an agreement must be signed by two parties to the contract or at least have witnesses thereto.

For the above stated reasons, this appeal is hereby dismissed with costs.

**M. G. MZUNA,
JUDGE.
20/9/2013**

Court: Judgment delivered this 20th day of September, 2013 in the presence of the parties.



**M. G. MZUNA,
JUDGE.
20/9/2013**