IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 232 OF 2018

(Arising from the judgment and decree of the Resident Magistrate Court for Dar es Salaam at Kisutu in Civil Case No 43 of 2007)

THE BOARD OF TRUSTEES OF THE

PARASTATAL PENSION FUND.....APPELLANT

VERSUS

1. KOBERO THOMAS
2. OMARY SADIK
3. SALEHE MOHAMED
On their own behalf and on Behalf of 130 others
.....1ST RESPONDENT

BLANKET& TEXTILE MANUFACTURERS (1998) T. LTD..2ND RESPONDENT

JUDGEMENT

MASABO, J.:-

In this appeal, the Board of Trustees of the Parastatal Pensions Fund is challenging the judgment and decree entered in favour of the 1st Respondents by the Resident Magistrate Court for Dar es Salaam at Kisutu. In the impugned judgment the appellant was ordered to pay a total of Tshs 91,2000,050.59 to 1st respondents being gratuity in respect of the Respondents following their retrenchment from work. The appeal is

premised on the ground that the trial court erred in holding that no evidence was adduced to show that the 1st respondents were dully paid; the trial magistrate failed to analyse evidence tendered, and finally, it erred in holding that the respondent proved their case while in essence it was the appellant who proved its case. Based on this, the appellant prays that the judgment and orders of the trial court be quashed; any relief that the court may deem fit and costs.

In brief, the appeal emanates from a suit filed by the 1st respondents claiming from the appellant the above sum being payment in respect of a gratuity allegedly not paid to them following their retrenchment from work in 1995 by their former employer Blanket's Manufacturers Limited. It was alleged that the amount which was part of their terminal benefits could not be paid to them at the material time as their employer had not remitted their contribution for the period between 1992 and 1995. Later on, the sum was paid to the PPF by the Presidential Parastatal Sector Reform Commission (PSRC) which took over the responsibilities of the defunct Blanket's Manufacturers Limited. PPF never paid the same to the 1st respondents. During trial, it did not dispute the fact that it received the monies from PSRC but maintained that, it paid the same to the 1st respondents a fact which was forcefully refuted by the 1st respondents. Meanwhile, the PPF successfully filed a third-party notice against the 2nd respondent who upon being property served filed a written statement in which it admitted to have received the monies but stated that it paid the same to the 1st respondents. However, it defaulted appearance during trial and hearing proceeded in its absence. In

the final event, the trial court found the 1st respondents to have proved their case and awarded their prayers.

The appeal was argued in writing. For the Appellants it was argued that the decision by the trial court that no evidence was rendered to show that the sum had been paid was erroneous as the appellant produced a payment voucher through which it was proved that the monies was paid to the 2nd respondent. It was argued that, exhibit D1 and D2 sufficiently established that the 1st respondents were paid dues. It was further argued that the amount above is wrongly claimed because although it is undisputable that there was default in remission of the said sum and that it was latter remitted by PSRC, the said sum was in form of monthly contribution which was committed and paid to the 1st respondents in form of pension.

It was argued that in law the burden to prove existence of claim rests on the plaintiff (section 110 of the Evidence Act, Cap 6 RE 2019). Thus, the 1st respondents had the burden to prove their claim before the trial court. They had to prove that they were not paid. The Appellant further proceeded to submit that the court erred for failing to enter judgment against the third party who defaulted appearance during trial. In this case, the provision of Order 1 Rule 19 was cited in support.

For the 1st respondents, it was briefly argued that the finding of the court was correctly arrived at because they ably established that they had not been paid their dues. It was further argued that, the Appellant herein did not

dispute that it received the monies from the PSRC but averred that they paid the same to the 2nd respondent which had no relationship with the 1st respondents as it came into being in 1998 whih was about three years after their retrenchment.

I have carefully considered the submission by both parties. Let me state from the outset that, I will not labour on the last submission made by the appellant regarding the omission by of the trial court to enter judgment against the 2nd respondent as it was not pleaded in the memorandum of appeal contrary to the well-established principle that the parties are bound by the pleadings. In any case there is still a room under Order I rule 19 for enforcement of the appellant's rights against the 2nd respondent.

This being said. There is only one issue for determination, namely, whether the 1st respondents established their claims against the Appellant? Upon considering both submissions I agree with the appellant submission with the regard to the burden of proof as it reflects the position of the law as stated under section 110 of the Evidence Act [Cap 6 R.E 2019]. It therefore stands to be established whether the 1st Respondents ably discharged their burden.

The law recognizes both oral and documentary evidence and accords them equal weight, provided that the evidence so adduced is direct evidence as per section 62 of the Evidence Act. Section 61 of this Act states that: *"[A]ll facts, except the contents of documents, may be proved oral evidence."* There is yet on other principle regarding the number of witnesses and this

is provided for under section 143 of the same Act which states that "*.....no particular number of witnesses shall in any case be required for the proof of any fact"*(Also see **Ally Shenyau V. R. (CAT) ARUSHA Cr. App. No. 27 of 1993 (Unreported); Yohanis Msigwa v R [1990] TLR** 148 CAT**.** What matters mostly, is the credibility and reliability of the evidence of the witnesses called upon to testify.

Guided by these principles, I will answer the above question in the affirmative. The court record reveal quite clearly that the 1st respondents orally proved their case that they were not paid the commuted lumpsum at the period of retrenchment because their employer had defaulted remission a fact which was undisputed. Having successfully discharged their burden, it was upon the appellant to discredit their story. As alluded to earlier, on its part, the appellant did not dispute to have received the monies from PSRC nor did it render any evidence to show that the monies were paid to the 1st Respondent. All it managed to show is that having received the monies from PSRC it did not directly pay the 1st respondents. Instead, it paid the same to the 2nd respondents in anticipation that the later will affect payment. It is also on record that, the 2nd respondent who took over from Blanket Manufacturers Limited, admitted to have received the claimed sum but he asserted to have effected payment on the 1st respondents. In paragraph 2 of its written statement of Defense it stated that the suit sum was arrears due to 455 former employees, and that, the same was paid to them. However, as it defaulted appearance during the hearing its assertions

remained unsubstantiated. Under the premise, I find no material upon which to fault the findings of the trial court.

The appeal is hereby dismissed with costs.

DATED at DAR ES SALAAM this 18th day of June 2020.

J.L. MASABO

JUDGE