

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

HC. CIVIL APPEAL NO. 45 OF 2020

(Arising from Ilemela District Court in Civil Case No. 3 of 2019)

**SULTANALI JAVER T/A
MWALONI FILLING STATION APPELLANT**
VERSUS
MASHAKA EDWARD BUGARIKA RESPONDENT

JUDGMENT

05 & 30/10/2020

RUMANYIKA, J.:

The appeal is against judgment and decree dated 14/04/2020 of Ilemela district court, with respect to claims of shs. 85,996,838/= by Sultan Javer t/a Mwaloni Filling station (the appellants) against Mashaka Edward Bugarika (the respondent) the case having been dismissed without costs for want of proof.

The grounds of appeal revolve around 2 points: - **(1)** that the claims of shs. 85,996,838/= were substantially and specifically proved **(2)** that with respect to claims of 15.0m the trial magistrate's failure to enter judgment on admission was erroneous.

Messrs Erick Katemi and Dorothea Method learned counsel appeared for the appellant and respondent respectively.

Having dropped the first ground of appeal, Mr. Erick Katemi learned counsel submitted that in fact with respect to claim of shs. 15.00m the trial court should have held the respondent liable upon receiving the demand note (Exhibit P1) and he admitted the claims (Exhibit P2) with the remaining sum one having had not proved full payment. We humbly pray with costs the learned counsel further contended.

Ms. Dorothea Method learned counsel submitted that there was no respondent's admission or something because; **(a)** the written statement of defence suggested no admission **(b)** in his testimony the respondent categorically he denied the claims as he had cleared the entire debt much as based on trust and good will the parties had only executed a gentlemen's agreement. No receipts issued or something except the bank cheques. We humbly submit that the devoid of merits appeal be dismissed with costs the learned counsel rounded up her point.

In his rejoinder, Mr. Erick Katemi learned counsel submitted that one having had promised in 2018 to pay, the respondent should have, if at all he substantiated the alleged payment. That is all.

One having had attempted one, but according to records the mediator magistrate failed on 10/06/2019, issues framed by the parties and the trial court adopted them, the point was **whether against the defendant the plaintiffs' claims of shs. 85,996,839/= were substantive.**

With regard to the appellant's case, Mr. Adolf Winfred Kinyanguli, the plaintiffs' manager and the sole prosecution witness in a nutshell he stated

that traditionally, but orally the respondent used on credit basis to collecting fuel from the appellants since the year 2017 and he paid all except the disputed balance of shs. 85,9996,830/= irrespective of several and repeated promises to pay (copies of the appellants' demand note dated 16/07/2018 and the respondent's letter dated 23/07/2018-Exhibits P1 and P2) respectively a total of 19 bank cheques exceeding shs. 85,996,839/= having been issued by the respondent as security/bond (Exhibit P3) collectively. That if anything, the respondent's admission (Exhibit P2) it was only for shs. 15.0m claims and upon one presenting them the bank cheques actually bounced. That is all.

Mashaka Edward (the respondent) and the sole defence witness he stated that indeed traditionally between the years 2017 and 2019 (inclusive of the years) I suppose on credit basis he had traded with the appellants but upon depositing some bank cheques as security at a later stage he paid them and he was done since but they issued him no receipts that the appellants' claims (also with respect to shs. 15.0m (Exhibits P1 and P2) were false and baseless. That is it.

The central issue is whether with respect to claims of shs. 85,996,839/= the appellants' case was proved on the balance of probabilities. I choose to start with the said shs. 15.0m/= although there was nothing on the respondent's written statement of defence to suggest admission, the respondent is on record (paragraph 2 at page 29 of the typed proceedings) having stated:-

"...Exhibits P1 and P2 they are true, for there was a debit of shs. 15,000,000/= which I owed the plaintiff but I did pay that debit ...

From the quotation above the respondent may have had paid the debit yes, but he should have reduced it writing he didn't just like despite the fact that traditionally they transacted the business verbally, with respect to the said shs. 15.0m debit this time around promised and put it and reduced his commitment in writing on 23/07/2018. In fact on this one the learned trial resident magistrate should have entered judgment on admission frankly.

With regard to depository of the bank cheques (Exhibit P3) essentially the parties agreed it to be a mere/bond the issue of the respondent's bank cheques having bounced therefore, and on that one need of judgment on admission it should not have been raised much as there was, in that regard no single delivery note ever issued by the appellant and duly received by the respondent. I think in all cases a plaintiff's burden of proof needs not go beyond the defendant's failure to show that he was done but the plaintiff's proof that the defendant had acknowledged receipt of the goods/service as the case may be worth the amount of money claimed the defendant's promise to pay notwithstanding after all if anything, in the instant case the respondent's commitment to pay made no total of shs. 85,996,839/= being claimed. I will increasingly hold that between them, the parties may have had executed a gentleman's agreement yes, but it left a million questions not answered as shs. 296.0m

plus business transaction or part thereof it should not have been just like that carried out orally possibly no tax was ever paid or only less was paid.

In the upshot, the appeal is partly dismissed and only with respect to the said shs. 15.0m allowed. Each party shall bear their costs given nature of the case the respondent pay shs. 15.0 million plus 7% decretal interest. It is so ordered.

Right of appeal explained.


S. M. RUMANYIKA

JUDGE

29/10/2020

The judgment is delivered under my hand and seal of the court in chambers this 30/10/2020 in the presence of Mr. Erick Katemi learned counsel only.




S. M. RUMANYIKA

JUDGE

30/10/2020