

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CIVIL APPEAL NO. 6 OF 2020

(Arising from Civil Case No. 3/2019 of Korogwe District Court Hon. M. J Ngulu, RM)

BLUE PARROT MOTEL.....1st APPELLANT

JOSIA MBOWE.....2nd APPELLANT

-VERSUS-

AYUB PONDA.....RESPONDENT

JUDGMENT

Date of last order: 06/08/2021

Date of judgment: 22/09/2021

AGATHO,J.:

Brief background of the appeal reveal that the Appellants appealed to this Court after being aggrieved by the decision of Korogwe District Court No. 3 of 2019 in which the Respondent was awarded T.sh 13,915,000/= out of T.sh 34,165,000/= he claimed as unpaid amount of money the Appellant owes the Respondent for the supply of best to the 1st Appellant hotel between August, 2016 to July, 2017. The grounds of appeal are:-

- (1) That the trial Court erred in fact and in law to condemn the Appellants to pay T.sh 13,915,000/= basing on the invoices

purported to have been issued by the Appellants while the alleged to have been provided by the Respondent.

- (2) That the trial Court erred in fact and in law to order the Appellants to pay T.sh 13,915,000/= to the Respondent while the Respondent had not proved his case on the standard required.
- (3) That the trial Court erred in fact and in law to order the Appellants to pay the Respondent general damages to the tune of T.sh 5,000,000/= as a punishment to the Appellants.
- (4) That the trial Court erred in fact and in law to order the Appellants to pay general damages while the Respondents claims were not proved on the standard required by law.

From the above ground of appeal, the Court drew the issues for determination. That is, whether the trial Court erred in law and fact to condemn the Appellants to pay T.sh 13,915,000/= basing on the invoices purported to have been issued by the Appellants while the alleged to have been provided by the Respondent. And whether the trial Court erred to award the Respondent T.sh 13,915,000/= while he has not proved his case to the required standard as established by the law.

To begin with the Appellant faults the trial Court decision to grant the Respondent T.sh 13,915,000/= without proof of the validity of invoices alleged to have been issued by the Appellants while they lacked critical information.

I should state from the outset that the said critical information has not been explained by the Appellants in their submissions. However, I perused the trial Court's judgment at page 3, and observed that the Appellants were faulting the invoices because they lacked company's seal, name of the Officer who received the alleged beef (cattle meat). They also had no. TIN number and VRN number. I have gone through the trial Court proceedings at page 33 – 34 and noted that DW1, testified that the invoices brought/tendered by the Respondent were invalid because they lacked and name of the receiver, company seal/stamp and TIN number.

I keenly weaved the trial Court records, and went on trying to read between the lines with hope to find a paragraph in which the Appellant claims to have tendered before the trial Court a sample of the purported genuine or valid invoices of that could be compared with the alleged invalid invoices tendered by the Respondent. I must admit that the Appellants did

not tender such invoices to contradict the invoices tendered by the Respondent.

The Appellant claimed that there was no written agreement between them and the Respondent. The Law of Contract Act [Cap 345 R.E 2019] recognizes various types of contracts including oral and written contracts. Thus, the Appellants claim that there was no contract while the Respondent adduced evidence that there was oral contract does not fit well in our legal system. That is probably why the Appellants dropped that claim in this appeal.

I have also noticed in respect of the 1st ground of appeal that the Appellants were belabouring on the issue of invoices. They cited Section 36 (1) of Tax Administration Act, 2015 which imposes a duty on the supplier of goods or service provider or any person who receives payment for the goods supplied or services rendered to issue fiscal receipt or fiscal invoice by using electric fiscal device. Looking at records of proceedings in the trial Court, the invoices were issued by the Appellants to the Respondent. If they were fabricated or anyhow invalid, it was up to the Appellants to tender any other invoice to counter them. I have held that the Appellant failed to tender the purported valid or genuine receipts.

Regarding the EFD invoices and receipts, with due respect, the Appellants are forgetting that the case at hand is not about tax/revenue collection. I need not to emphasize that the matter at hand is about breach of oral contract/agreement evidenced by the non-payment of invoices that the Respondent had initially been given by the Appellants. I have stated herein above this was oral agreement. Bringing tax administration law into this matter including EFD will vitiate the rights of the Respondent established by the Law of Contract Act [Cap 345 R.E 2019]. I am not prepared to do so.

The use of EFD as proof of services rendered or base of claim has presented difficulties in some instances for instance in provision of legal services as contractual arrangement. While in the premises of the present case it is hard to get a directly related case law, I would draw an analogy from Bill of Costs reference. In **Professor Emmanuel A. Mjema V. Managing Editor Dira ya Mtanzania Newspaper and 2 Others, Reference No. 7 of 2017, High Court of Tanzania (unreported)** in which demand for EFD receipts from an Advocate to support Bill of Costs and to prove instruction fee or costs for legal services rendered have been held to be illusory and hence not a good law. It should be remembered

that an enforceable contract is established by the law of contract, and not merely taxation. This is not to say that other formal legal requirements cannot make the otherwise valid contract unenforceable. I am of a settled view that should there be a claim of tax avoidance or anything to do with tax administration then the taxation law will apply. This was not the issue before the trial court.

The Appellant's neither tendered genuine invoices in the trial Court nor filed criminal case on forgery of the invoices. I thus find the 1st ground of appeal lacking basis. I dismiss it.

As for the 2nd ground of appeal the Appellants claims that the trial Court erred to award the Respondent T.sh 13,915,000/= while he has not proved his case to the required standard as established by the law. In civil suit the standard of proof is as balance of probability of Section 3 (2) (b) of the Evidence Act, [Cap 6 R.E 2019]. This was also held by the Court of Appeal of Tanzania in **Tatu Mohamed v Maua Mohamed Civil Appeal No. 31 of 2000 Court of Appeal of Tanzania (unreported)**. The balance of probability is the standard in civil cases as opposed to criminal trial where the prosecution must prove the charge the beyond reasonable doubt. Looking at the evidence on record, the Respondent evidence was that the

contract/agreement was oral one, and he tendered invoices he got from the Appellants. If the Appellants had issues with the invoices the burden of proof was on them, and they ought to have tendered the genuine and valid invoices with attributes they claimed to be lacking in the invoice tendered by the Respondent. Failure to tender the purported valid/genuine invoices makes probability that the Respondent receipts was genuine and have not been discredited or contradicted. Mere allegation that they are not genuine is not enough.

Moreover, the Appellant have argued that the evidence law under Section 110 (1) (2) of the Tanzania Evidence Act, Cap 6 R.E 2019 provides that he who alleges must prove. This was stated in **Sultanale Javier T/A Mwaloni Filing Station v NSK Oil & Gas Ltd High Court of Tanzania, Civil Case No. 40 Of 2015 (unreported)**. In other words, the Appellants argue as per their provision of the law that:

- i. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.
- ii. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person.

Undisputedly, the above provision of law was cemented in **Anthony M. Masanga v Penina (Mama Ngesi) & Lucia (Mama Anna) Civil Appeal No. 118 of 2014 Court of Appeal of Tanzania**. Thus, the said position of law is trite. But, the principle that the burden of proof in civil case lies on the person alleging existence of certain facts has in the present case been discharged by the Respondent by tendering the invoices that he was given the Appellants, and the latter are surprisingly disputing their genuineness that they lacked company seal, TIN, and VRN number. Looking at the evidence on record, it is indeed the Appellants who have failed to discharge the burden of proof as to the existence of valid and genuine invoices. If the Appellants saw all these faults, then the burden lied on them to prove that the invoice were nothing but a façade of forgery by tendering the invoices with the validity attributes. This was not done. Consequently, I am also bound to reject the 2nd ground of appeal.

If we could revisit the record, it is conspicuous that the Appellants instead of tendering purported genuine invoices they brought DW2 - government procurement officer (seen on pages 36 – 38 of the trial Court proceedings) to examine the invoices. Unfortunately, he is not a replacement of a need for tendering the genuine invoices. It is unquestionable that DW2 knows

government procurement. But it is unclear if he is an expert on invoices and receipts. In the circumstance of this case, be it as it may the tendering of genuine invoices was inevitable.

Further, the Appellants alleged that they do not know Mr. Mtei who was their Manager. But again, another Manager of theirs was Mr. Mushi. Yet there was another person, Mrs Dorice who is the spouse of the 2nd Appellant. These three were material witnesses whom the Appellants chose not to bring before the trial Court to testify. The Court may draw adverse inference against the Appellants' failure to call these witnesses as held in **Azizi Abdallah v R [1991] TLR 71**. These witnesses knew about brief supply.

On the 3rd ground of appeal the appellants claim that the damages awarded more excessive. I define whether damages awarded is excessive the Appellate Court looks at the principle used in awarding the damages. If the principle is wrong the Court can vary the damages awarded if it is correct the Court cannot interfere. Awarding of general damages is a discretion of the Court that must be exercised judiciously. In the present case, the trial Court awarded general damages after considering the time elapsed from 2016 to 2020 when the matter was determined.

Moreover, the Appellants neglected to perform their obligation under the contract. Also considering the quantity of beef 2783 Kilograms valued at 13,918,000/= that was not only a big consignment of beef, but I find the general damages of T.sh 5,000,000/= reasonable and not excessive. Therefore, the 3rd ground of appeal loses its footing

In lieu of the foregoing this appeal lacks merit. And I dismiss it with costs.

DATED at TANGA this 22nd Day of September, 2021.




U. J. AGATHO
JUDGE
22/09/2021

Date: 22/09/2021

Coram: Hon. Agatho, J


Appellants: Present with their advocate Yona Lucas

Respondent: Present

B/C: Alex


Court: Judgment delivered on this 22nd day of September, 2021 in the presence of the Appellants and their advocate Yona Lucas, and Respondent.




U. J. AGATHO
JUDGE
22/09/2021

Court: Right of Appeal fully explained.




U. J. AGATHO
JUDGE
22/09/2021