

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

CIVIL APPEAL NO. 16/2019

(Arising from Civil Case No. 18/2018 at RM's Court Bukoba)

OLAM TANZANIA LTD.....APPELLANT
VERSUS
TUMAINI NICODEMU.....RESPONDENT

JUDGMENT

09th April & 11th May 2021

Kilekamajenga, J.

The appellant was dissatisfied with the decision of the Resident Magistrate's Court of Bukoba in Civil Case No. 18/2018 hence this appeal. Before the trial court, the respondent claimed from the appellant a total amount of Tshs. 103,769,460. The claim arose from the breach of contract whereby the respondent contended that when the contract came to an end, there was an outstanding money for the delivered coffee. After the trial, the trial court was convinced that the respondent's case was proved to the required standard hence decided in favour of the respondent.

Before embarking on the merits of the appeal, I find it apposite to narrate the brief facts of the case. The appellant was a business company dealing with buying cherry and clean coffee within Kagera region. The respondent was employed as an agent of the appellant for buying and supplying the coffee to the appellant. In 2014, the appellant and the respondent entered into an

agency agreement. The appellant gave money to the respondent for the purchase of coffee and deliver them to the agreed destination. Also, the appellant was responsible for payment of commission and costs of transportation after the delivery.

The contract between the parties was signed on 20th April, 2014 which was expected to end in November 2014. However, the contract did not end as expected because the appellant terminated it in September 2014. The respondent blamed the appellant for breach of contract. On 6th June 2018, the respondent wrote a demand note to the appellant claiming payment of Tshs. 103,151,560/=. The respondent alleged that, the claim accrued delivered coffee. The appellant denied that claim and further alleged to have advanced Tshs. 233,084,000/= to the respondent but he (respondent) only delivered coffee worth Tshs. 182,939,260/=. Therefore, the appellant raised a counter claim against the respondent of Tshs. 50,144,740/=. On 12th June 2018, the respondent filed a suit against the appellant before the Resident Magistrates' Court of Bukoba.

In his evidence before the trial court, the respondent contended that he delivered 109,847 kilograms of coffee worth Tshs. 182,939,260/=. In the plaint he claimed 85,024,860/= as an outstanding money for the costs spent by him (respondent) during the purchase of coffee for the appellant. During

the hearing, the respondent contended that the total claim against the appellant was Tshs 103,769,460/= which resulted from unpaid delivered coffee, commission and costs of transporting the coffee. The trial court was satisfied with the respondent's claim and awarded him the payment of Tshs. 103,726,460/= as specific damages and Tshs. 10,000,000/= as a general damages. Furthermore, the court awarded 18% interest rate per annum from the date of default to the date of judgment; 7% as a decretal sum from the date of judgment to the date of final payment. Aggrieved with the findings of the trial court, the appellant preferred this appeal.

When the appeal came for hearing, the appellant was represented by the learned advocate, Mr. Innocent Bernard whereas the respondent was represented by the learned advocate, Mr. Zeddy Ally. During the oral submission, the counsel for the appellant argued that that the trial magistrate failed to evaluate the evidence leading to the erroneous decision. He argued further that the court failed to evaluate the evidence presented by the parties before granting specific damages; such damages ought to be pleaded and proved. However, that requirement was not adhered to by the trial magistrate. To buttress his contention, he prayed the court to refer to the cases of **Zuberi Augustino v. Anicet Mugabe [1992] TLR 137** and **Bamprass Star Service Station Ltd v. Mrs. Fatuma Mwale [2000] TLR 390**. On the issue of modality of payment of money, the learned counsel

contended that in their agreement, there was no clause that obliged the appellant to pay the money to the respondent through the bank. Payments could be done through the bank or by cash. On the other hand, the respondent was supposed to buy coffee after the appellant advanced money to the respondent. The respondent had no duty to buy the coffee without the money from the appellant. He further argued that the counter claim of Tshs. 50,144,740/= was proved to the required standard. He finally urged the court to allow the appeal and set aside the judgment of the trial court.

In reply, the learned counsel for the respondent contended that the case was proved to the required standards. The receipts of the delivered coffee indicated the money he ought to receive from the appellant. In addition, the bank statement revealed that the respondent received a total of Tshs. 110,700,000/= from the appellant. Also, the money was supposed to be paid through the bank and not otherwise. Therefore, there was an outstanding payment to the respondent was TZS. 103,000,000/=.

He contended further that DW1 was not the right person to testify before the trial court because the respondent never worked with him; instead, the suitable was Jeremiah Johnson.

When rejoining, Mr. Innocent reiterated that there was no evidence to prove the plaint. He stressed that there was no requirement to pay the money

through the bank. Furthermore, the evidence shows that the appellant advanced money to the respondent. He urged the court to allow the appeal.

I had opportunity of passing through the proceedings of the trial court. The main issue that has led to the instant appeal was whether the claims by the respondent were proved to the required standard. There is no dispute that the parties entered into the contract for purchase of coffee. It is also undisputed that the appellant advanced money to the respondent to enable him buy the coffee. As a result, the respondent performed his duty by supplying coffee to the appellant. The dispute is on the use of the money advanced by the appellant to the respondent vis-à-vis the amount of coffee delivered. On the other hand, the respondent contended that the outstanding money was at the tune of Tshs. 103,726,460/=. After passing through the proceedings and exhibits tendered by the parties, I could not find anything suggesting that the parties agreed for the respondent to deliver the goods without being paid the commission and costs for transport. The record was silent on whether the respondent ever claimed payment for the outstanding money immediately after halting the contract; the contract was terminated on 12/09/2014, the respondent wrote the demand note on 06/06/2018. This was a lapse of about four years since the contract ended. Before the trial court, the respondent did not state if he had ever claimed for payment of the outstanding money from the appellant.

The germane question that begs an answer is why did the respondent keep quiet for his claim for four years? In my view, it is doubtful whether the respondent's claim was genuine. If the respondent's claim was unfeigned he ought to take prompt actions against the appellant. The respondent's silence suggests that the appellant's story was correct. The appellant's side of story points towards the fact that the respondent received money to buy coffee. The money he received was comparatively incommensurate to the amount of coffee delivered. The appellant finally terminated the contract because the coffee season ended and the respondent was unable to deliver the coffee. Therefore, the respondent was supposed to refund the money received but he did not use it for the purchase of coffee. This portion of story is evidenced with a plethora of documents available in the court file. For instance, there is a letter dated 01st September 2014 where the appellant and respondent met and the respondent acknowledged that he owed Tshs. 84,243,990/= to the appellant. In that letter the respondent promised to pay back the money. The letter is signed by the respondent as an acknowledgement. Furthermore, the copy of the ledger available in the file shows that on 23rd October 2014, the appellant owed the respondent Tshs. 50,144,740/= and the respondent acknowledged by signing. This amount of money is also stated in the appellant's counter claim. The record of the court does not suggest that the respondent had any claim against the appellant hence he afforded the silence

of four years. On the other hand, the appellant's claim against the respondent immediately arose after the contract was terminated. In civil cases, it is well settled that a party with heavier evidence has a good case against the other and must win. See, the case of **Hemed Said v. Mohamed Mbilu [1984] TLR 113.**

Another argument frequently advanced by the respondent is that they agreed that all payments to be made through account No. 32101600414 NMB Bank at Ngara. I had opportunity to pass through the terms of the contract (Exh. PE 6 and DE 1) and did not find where that term feature. For instance, at paragraph 12 (d) of the contract, it was agreed that;

12. That the Principal shall have the following obligations:

a).....N/A

b).....N/A

c).....N/A

d) To provide sum or sums, as shall be agreed from time to time, in advance to enable the Agent to purchase the Cherry and or clean coffee on behalf of the Principal.

In the contract, the above paragraph that shows how the payments were supposed to be done. There is no requirement to pay the money through the bank hence, as well stated by the appellant, some of the money was deposited in the respondent's bank account and some given in cash. Therefore, the respondent's allegation that all payments were done through the bank account does not hold water.

Furthermore, according to the bank statement issued by the bank which is exhibit PE 3, the appellant deposited money into the respondent's bank account for the first time on 04/07/2014 while the contract was entered on 20/04/2014. The respondent did not tell the court why there was a delay of about three months from effecting the terms of contract and the respondent never complained. It is very likely that some of the money was given to the respondent in cash and that might be the reason why the respondent did not complain about the delay.

In addition, it was agreed between the parties that the respondent was not allowed to buy the coffee from peasants on credit. He was required to pay them immediately before taking their coffee. If that is the case, the respondent was required to tell the court on how he managed to buy the coffee valued more than TZS. 103,000,000/= from his own pocket and deliver the same to the appellant without being paid an advance money advanced by the appellant. How did he manage to remain silent for almost four years without demanding this money (i.e. the one used to buy coffee, if any).

Apart from the above shortfalls, the respondent contended that he delivered to the appellant 109,847 kilograms of coffee which were valued at Tshs. 182,939,260/=. In his claim however, he did not substantiate the actual

kilograms of cherry coffee and clean coffee. Instead, he stated that the clean coffee (*kahawa zisizo na maganda*) was sold at the price between Tshs. 2,700/= to 3,000/=. He failed to show the kilograms of clean coffee that were bought at Tshs. 2,700 and at Tshs. 3,000/=. Therefore, the respondent failed to assist the court to come out with the clear information about his claim.

I am of the settled view that the respondent was supposed to know his claim before knocking the doors of the court. The court can not take the role of the parties and prosecute the case or speculate information not known to the respondent. Unfortunately, the respondent did not perform his role. For instance, at page 36 of the typed proceedings he was quoted saying;

"I do not remember the value of the goods I delivered which the OLAM received from me."

At page 33 he stated that:

"..... I do not remember how many kilograms of coffee I delivered to the OLAM,..."

At page 35 he stated that:

"I did not know the amount I claimed from OLAM"

All these pieces of evidence suggest that the respondent did not know what took him to court.

It is very unfortunate that the trial court granted the respondent's claim which in my view was not proved even on the mere balance of probability. As argued by the appellant, the respondent went to court as a means to escape the debt owed to the appellant. In conclusion, I find the respondent failed to prove his case to the required standard. I hereby allow the appeal with costs and set aside the decision of the trial court. The appellant may file a fresh suit against the respondent in order to tender evidence to prove the counter claim. It is so ordered.

DATED at **BUKOBA** this day of 11th May, 2021.




Ntemi N. Kilekamajenga,
JUDGE
11/05/2021

Court:

Judgment delivered this 11th May 2021 in the presence of the learned counsel for the respondent, Miss Pili Hussein and the appellant's representative.




Ntemi N. Kilekamajenga,
JUDGE
11/05/2021