

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 21 OF 2020

ZIAD MOHAMED RASOOL GENERAL TRADING CO.L.L.C..PLAINTIFF

VERSUS

ANNETH JOACHIM MUSHI (Executrix of the

estate of Emmanuel Patrick Msoma (Deceased)..... **DEFENDANT**

JUDGMENT

30th June, 2021 & 13th August, 2021.

E. E. KAKOLAKI J

Ziad Mohamed Rasool General Trading Co. L.L.C, a company incorporated in Dubai hereinafter referred to as Plaintiff is suing the Defendant as an executrix of the estate of the late Emmanuel Patrick Msoma, for recovery of United Arab Emirates (UAE) Dirhams Four Hundred and Seventy Eight Thousand Four Hundred and Four (UAE Dir 478,404.00) or its equivalent in United stated Dollars (\$ 130,355.31) at the rate of Dirham 3.67@1US Dollar or equivalent in Tanzanian Shillings Two Hundred Ninety Nine Million Eight Hundred Seventy Thousand Two Hundred and Twenty One, being the outstanding amount for the goods sold to the said late Emmanuel Patrick Msoma hereinto referred as "*deceased*". Further to that she is claiming for payment of US \$ 50,000 as general damages plus costs of the suit and any

other incidental costs or reliefs as it deems fit for this court to grant. The plaintiff's claims against the defendant are that before his ultimate death the late Emmanuel Patrick Msoma had several credit oral agreements with the plaintiff for supply of goods (men's wear) two of which are the last transactions of 06/11/2016 and 08/11/2016 worth UAE Dir 55,050.00 and UAE Dir 434,160.00 respectively. Upon part payment of the said amount plus the long standing debt the remaining unpaid debt of the purchase price stood at UAE Dir 478,404.00. It was parties' express or impliedly terms of the agreement that the deceased would pay the purchase price on delivery of goods as it used to be. Upon being served with the plaint the defendant through her written statement of defence squarely denied the claims deposing that there was no proof by the plaintiff that the deceased had ever engaged into credit business transactions with the plaintiff for supply of the alleged goods. In other words she is contesting existence of any sale or supply of goods agreement between the plaintiff and the deceased and the claimed damages.

Determined to resolve parties' dispute four issues were framed by the court going thus:

1. Whether there was supply of goods agreement between the Plaintiff and Defendant.
2. If the firsts issue is answered in affirmative, whether there was breach of the sale agreement.
3. Whether the plaintiff suffered loss and to what extent.
4. To what extent are the parties entitled to.

It is a settled law that he who wants the court to give verdict in his favour on a certain right or liability depending on existence of certain facts must prove that the same do exist. So the burden of proof lies on that person who alleges. This principle of the law is sourced from section 110 of the Evidence Act, [Cap. 6 R.E 2019] which provides:

"110. (1) Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

In this case the plaintiff asserts existence and breach of sale of goods agreement between her and the defendant's husband (deceased) for non-payment of the purchase price due the result of which she suffered both specific and general damages. The onus of proof therefore lies on plaintiff bearing in mind that the standard of proof in civil case is on the balance of probabilities as it was held in the case of **Berelia Karangirangi Vs. Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (CAT-unreported) at pg. 7 and 8, where the Court of Appeal had this to say:

*"... we think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove. ...It is similarly that in civil proceedings, **the party with legal burden also bears the evidential burden and***

the standard in each case is on the balance of probabilities.” See also the case **Godfrey Sayi Vs. Anna Siame Mary Mndolwa, Civil Appeal No. 114 of 2012** (unreported). (Emphasis is supplied)

In discharging the above cited duty the plaintiff paraded three witnesses and tendered six exhibits whereas the defendant testified as sole witness and tendered no exhibits. Both parties were represented as the plaintiff hired the services of **Mohami & Associates, Advocate** under Mr. Nassoro Mohamed learned advocate whereas the defendant enjoyed the services of Mr. Dickson Sanga learned advocate from **A & D Law Attorneys**. It was plaintiff's case through PW1 Ziad Rahpaima, that the deceased (Mr. Msoma) was personally known to him as long standing customer for the past fifteen (15) years after being introduced to him by one Badru Adam (PW2) businessman and company's client from Zanzibar who used to do business with him based on trust as there was no written contract between them. He said the deceased (Mr. Msoma) like PW2 used also to buy goods from his company (Plaintiff) both on cash and credit basis in which the purchase price due used to be paid through bank transfer (TT) as the company maintained with it a computer generated balance sheet for Mr. Msoma's business record keeping, the record which was tendered and admitted as exh. PE1. He said it was their practice that on payment the client used to be issued with receipt and in some occasions could as well deposit with the company some money to be deducted on each transaction of purchase of goods made. The court was told that, on 06/11/2016 the deceased visited Dubai and bought in cash goods worth UAE Dir 55,050.00 and two days later on 8/11/2016 purchased a new order on credit worth UAE Dir 434,160.00 and issued with invoice No.

26206 which was admitted as Exh. PE2, before the said goods were shipped and received by Mr. Msoma in Dar es salaam through Royal Marine Company. He evidenced that in between the deceased on 28/12/2016 sent him some money UAE Dir 128,523.00 to reduce his debt to the company. PW1 testified further that as per client balance sheet after deduction of the said paid on 28/12/2016, the amount due to the deceased stood at UAE Dir 478,404.00. It was his evidence that after two months of silence he called the deceased to remind him of discharging his debt in which he promised to so do through Bank transfer within few days but could not honour his promise. After two days he once again called him but his phone was not picked up until a week later when one lady responded introducing herself as Mr. Msoma's wife (defendant) informed him of the ultimate death of his client. On introducing her to the debt he testified the same could not be settled as was told the wife (defendant) was still waiting for appointment of the executrix or executor of the deceased estate. On confirming the said death from Mr. Badru (PW2) he had to wait but kept on calling the defendant who seemed to be adamant to pay before he decided to visit her in Dar es salaam for discussion in company of PW2, but the said visit could not bear fruits. As a result this suit was preferred by the plaintiff after issuance of Demand Notice which was tendered and admitted as exh. P3. PW1 pleaded the court to enter judgment in plaintiff's favour as prayed in the plaint. On being cross examined whether there was a company resolution for institution of this suit PW1 said there was one but did not tender it in court as evidence. On further cross as to whether he issued the deceased with a receipt on cash purchase of UAE Dir 55,050.00 he said he did but did not tender a copy of any receipt to justify the said payment. When referred to exh. P1 (Client Balance sheet)

which is prepared by the company and asked whether the deceased acknowledged to be indebted to the plaintiff PW1 voiced there is no that indication. And when further referred to exh. P2 (a profoma invoice) and asked whether it is a proof that the deceased (Mr. Msoma) received the alleged purchased goods he answered the same was not a proof. As to whether there was any document tendered in court to compare the alleged Mr. Msoma's signature in exh.P2 for the court to appreciate that it is his, he confessed there was none.

In support of her case the plaintiff summoned PW2, Badru Adam a business man from Zanzibar and Abdullah Ibrahim, PW3 an officer from Royal Marine Shipping Co. Ltd which allegedly shipped the purchased goods to Dar es salaam. In his testimony PW2, confirmed to have introduced Mr. Msoma (deceased) to PW1 and that it is true after default of payment he accompanied PW1 to meet the defendant at Dar es salaam who at first admitted the debt and promised to repay but later on after being appointed executrix of the deceased's estate denied responsibility. He said the defendant never paid the plaintiff the due purchase price of goods supplied to Mr. Msoma on credit. Lastly was PW3 who testified to the effect that it is his company that made arrangements for shipping and in fact shipped the deceased's consignment to Dar es salaam Tanzania, the consignment which was delivered to them by the plaintiff whom they signed with a delivery order which he tendered but mistakenly admitted as Exh. P3 (as exh. P3 is the letter of demand notice) and for that purpose I will be referring it as exh.P3A. During delivery of goods he said, as usual the plaintiff presented to them a copy of invoice before they prepared the bill of landing that was handed to Mr. Msoma upon cash payment for shipping service of the said goods since

he was their long standing client as well as to the plaintiff. A copy of bill of landing issued to the deceased by EMIRATES SHIPPING LINE through ROYAL MARINE SHIPPING was tendered and admitted in court as exhibit P4. This witness told the court that he never heard from either the plaintiff or the deceased until when the plaintiff requested for proof of delivery of the alleged consignment entrusted to them for shipment. That they issued her (plaintiff) with a letter dated 30/12/2019 confirming to have shipped the cargo of 402 ctns of men sandals to the consignee Mr. Msoma (deceased) of Dar es salaam port in container No. FCIU-8123948, which was tendered and admitted as exh. P5. During cross-examination when asked to prove existence of alleged long time business relationship with the deceased by documentations PW3 said he had none. And when questioned as to whether the said delivery order bore the deceased's signature and company's stamp, PW3 said it only contained signatures of their officer and plaintiff's officer and it had no stamp because delivery was made at the godown and not in their office where the stamp is placed. And on further cross examination on proof of any receipt issued to the deceased as client on effecting payment for shipment of the cargo before he was issued with a bill of landing as alleged, PW3 said no receipt was issued and the deceased signed nowhere as the handing of original bill of landing to him was the only proof of payments.

On the other side the defendant in her defence flatly denied any responsibility concerning plaintiff's claims. She claimed to have not been aware of any business engagement or arrangement between the plaintiff and her late husband (deceased). She only admitted to have been called by PW1 (the plaintiff) over the claims but asked him to provide with her any

documents concerning that debt in which he failed to do, until when she was summoned in court to answer the claims. She denied to have been issued with any demand letter before institution of this case and therefore pray the court to dismiss this suit for want of evidence. At closure of defence case both parties prayed for court's leave which was granted for them to prepare and file their final submissions.

Having narrated the evidence from both sides let me now move to address the issues raised by the court after considering the submissions from both parties. As alluded to herein above it is the plaintiff who bears the burden to prove her case on the balance of probabilities, having alleged existence and breach of sale agreement between her and the defendant's husband the breach that suffered her damages as pleaded and prayed in the reliefs sought. To start with, the first issue is whether there was supply of goods agreement between the Plaintiff and Defendant. It is undisputed fact that Mr. Msoma who allegedly is indebted to the plaintiff is now dead. However his death is not a bar to his executor or executrix to be bound by his promises to pay the debt as provided by the law under section 37(2) of the Law of Contract Act, [Cap. 345 R.E 2019] upon proof that there existed an agreement between the parties to the suit. The said section 37(2) of the Law of Contract Act, provides that:

(2) Promises bind the representatives of the promisor in case of the death of such promisor before performance, unless a contrary intention appears from the contract.

As stated above the plaintiff herein claims that there was oral agreement for supply of goods between her and the defendant's husband (Mr. Msoma)

which was based on trust. It is for her therefore to so prove with evidence. Sale of goods agreements in our jurisdiction are governed by the Sale of Goods Act, [Cap. 214 R.E 2002]. Under section 3(1) of the Act sale of goods agreement is formed between the parties where the seller transfers or agrees to transfer the property in goods to the buyer upon consideration which is called "price". Section 3(1) of the Act reads thus:

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price, and there may be a contract of sale between on part owner and another.

Section 5(1) of the said Sale of Goods Act provides further that the sale of good agreement can be made either by word of mouth or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. The provision of section 5(1) of the Act reads:

*5(1) Subject to the provisions of this Act and of any other written law in that behalf, **a contract of sale may be made** in writing (either with or without seal) or **by word of mouth or partly in writing and partly by word** or may be implied from the conduct of parties.*

With the above provisions of the law I have no doubt to hold the sale of goods agreement can be formed orally as well as in written form. And for that matter I am settled the alleged sale of goods agreement between the parties fall and is governed by the said Sale of Goods Act. Now having gone through the submissions by Mr. Nassoro for the plaintiff as well as the evidence tendered in court, it is clear to me that the plaintiff relies on

existence of the invoice allegedly issued to Mr. Msoma (deceased) and signed by him exh. P2, computer generated client balance sheet exh.P1, delivery order exh. P3A, Bill of landing exh. P4 and confirmation letter from the Shipping Line Agent that the cargo was shipped to Mr. Msoma of Dar es salaam Port exh. P5 to prove existence of sale agreement between her and the defendant's husband one Mr. Msoma. Mr. Sanga for the defendant in resisting the submission by Mr. Nassoro argued that the plaintiff failed to prove her claims for three reasons. **One**, she failed to tender any sale agreement signed by the parties proving existence of the alleged sale agreement for supply of goods. **Two**, the purported documents relied upon by the plaintiff were prepared by the plaintiff herself without any involvement of the late Msoma in anyway. **Three**, there is no proof that goods were received by Mr. Msoma as PW3 failed to exhibit handing over of the bill of landing to him for him (deceased) to collect the said goods at the port of destination. He thus implored the court to dismiss the suit for want of evidence.

It is true and I agree with Mr. Sanga that there is no proof of agreement for supply of goods between the parties be it by word or written as the sale of good agreement can as well be proved orally as provided under section 5(1) of the Sale of Goods Act. I so find as mere existence of invoice (exh.P2) allegedly signed by Mr. Msoma does not in my opinion prove the alleged fact that he purchased the said goods for want of proof of his signature in the said invoice. When cross-examined as to whether there was any other document tendered in court for the court to compare the deceased signature and satisfy itself as to genuineness of the document itself (profoma invoice) PW1 said, none was tendered. And when asked as to whether he tendered

the receipt issued to the good allegedly purchased in cash to the tune of UAE Dir 55,050.00, to prove his business engagement with the plaintiff, PW1 confessed he didn't. To let the witness air his account on that fact, I quote part of his testimony when he said:

"When payments is made always receipts are given to the clients. I did not tender a copy of the receipt to justify payments of Dh 55,050.00."

On further cross-examination as to whether the deceased (Mr. Msoma) acknowledged the debt shown in the purported balance sheet generated by the plaintiff herself, PW1 said he did not. In short this was his testimony:

"Normally the client is not given a balance sheet to acknowledge the amount he owes the company and the vice versa. There is nowhere Patrick Msoma acknowledged the balance due to him in that balance sheet is correct."

As that is not enough even PW3 who testified to have handed the original bill of landing (exh. P4) to Mr. Msoma when cross-examined as to whether he signed anywhere to prove collection of the said bill of landing, he said there was no such signature as the cash payments he made for the service was the only proof that he was handed with the said document though no receipt was issued and tendered in court to exhibit the said payments. Further to that there is no evidence to prove that Mr. Msoma received at Dar es salaam port the alleged cargo shipped by Royal Marine Company. On this I am taking judicial note that under customs procedure once the imported cargo arrives at the port an appointed agent has to submit importation documents for reconciliation process with the data already existing in the

Tanzania Customs Integrated System (TANCIS) before the consignment is cleared and collected by the importer. One of the documents to be submitted is the bill of landing. Thus all those importation documents proving delivery of the imported cargo is readily available at Port of Dar es salaam Customs Department. The plaintiff did not take trouble to visit the Customs Department and collect the said evidence for proof in court that the deceased received the goods under the sale agreement. I am of the considered view that under the circumstances of this case the plaintiff ought to have proved the deceased either accepted goods sold to him or actually received the goods sold to him or provide any proof of payments by the deceased, otherwise it is impossible to enforce this agreement by action as per the requirement of section 6(1) of the Sale of Goods Act, which provides thus:

S.6(1) A contract for the sale of any goods of the value of two hundred shillings or more shall not be enforceable by action unless the buyer accepts part of the goods so sold, and actually receives, the goods, or gives something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or by his agent in that behalf. (Emphasis is supplied)

In absence of evidence by the plaintiff to prove all these above alleged transactions it is my finding there was no involvement of the deceased (Mr. Msoma) in the alleged sale agreement as he is not featuring anywhere in the tendered documents as rightly stated by Mr. Sanga. As the plaintiff has failed to prove its case as per the requirement of section 110 of Evidence Act and

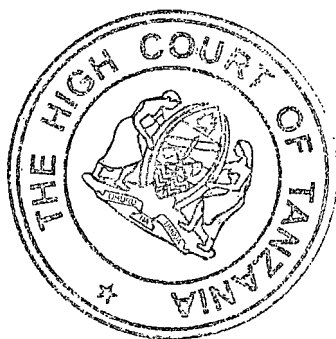
on balance of probability that he entered into sale of goods agreement with the deceased, I hold the first issue is determined in negative. Therefore there was no supply of goods agreement between the plaintiff and the defendant.

Next question for determination is whether there was breach of the sale agreement. This issue in my opinion need not detain me much as since there is no sale agreement there was no breached terms of agreement. This issue is therefore answered in negative. As there was no breach of agreement the plaintiff suffered no damages, thus the third issue is also answered in negative.

Now what are the available reliefs to the parties? As already found above the plaintiff has failed to prove her case on the balance of probabilities, the only available remedy to the parties is non than to dismiss. The plaintiff's suit is therefore dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 13th day of August, 2021.



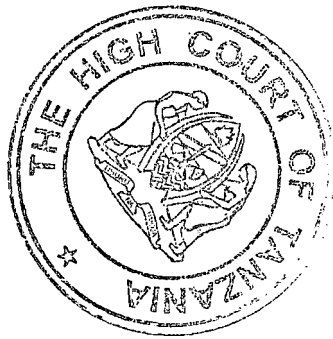
E. E. KAKOLAKI

JUDGE

13/08/2021

Delivered at Dar es Salaam in chambers this 23th day of July, 2021 in the presence of Mr. Ahmed A. Mwita, advocate for the Plaintiff, Mr. Noel Sanga, advocate for the Defendant and Ms. Asha Livanga, court clerk.

Right of appeal explained.




E. E. KAKOLAKI

JUDGE

13/08/2021