IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 248 OF 2021

(**From** Civil Case No. 72 of 2020 Before Kinondoni District Court)

THEODORA MICHAEL T/A 24HRS TRAVEL COMPANY……**APPELLANT**

VERSUS

AMANI MASUE…… **RESPONDENT**

JUDGMENT

Last Order: 27/6/2022
Date of Judgment: 22/7/2022

MASABO, J:-

The appellant is displeased by a judgment and decree of the district court of Kinondoni in Civil Case No. 72 of 2020 which dismissed her suit against the respondent. From the lower court record, it is gathered that, in the trial court, the appellant sued the respondent for breach of an oral agreement on sale of air tickets. It was alleged that under this agreement, the appellant was advancing the respondent air tickets on credit. The consideration price for the tickets advanced were to be paid after sale of the tickets to customers. At the end of trial, the court found that the appellant has

miserably failed to prove her claims and proceeded to dismiss the suit. Disgruntled, she has come to this court armed with the following grounds of appeal:

1. That, the trial court grossly erred in law and fact by failure to consider the weight of the appellant's evidence on record;
2. That, the trial court erred in law and fact by thrusting the appellant to tender electronic evidence (email and WhatsApp) printout whilst the same was neither controverted nor contradicted by the respondent during testimony of the Appellant
3. That, the trial court erred in law and fact when it raised issue(s) suo motto without affording parties the right to be heard.

Hearing proceeded orally. Both parties were represented. In support of appeal, Mr.Paul Kaunda, counsel for the appellant, combined the 2nd 3rd ground of appeal and submitted on the 1st ground of appeal separately. On the 1st ground he submitted that, the following two things were not controverted during trial: that, the appellant was issuing tickets on credit to the respondent and that the communication between the parties were through emails and WhatsApp messages. He proceeded that, as the

respondent did not cross examine on this point, it is assumed that he conceded to the plaintiff's averments. The case of **John Shini v R**, Criminal Appeal No. 573 of 2016, CAT (unreported) was cited in support. He added that it was wrong for the court to require the appellant to produce electronic evidence of his communication with the respondent as that was not at issues.

On the 2nd ground, he submitted that the court raised an issue *suo motto* and decided it without affording the parties the right to heard contrary to the law. He proceeded that it is a settled principle of law that, when a new issue is raised, the court should afford the parties the right to be heard before deciding such issue (**Wegesa Joseph M. Nyamaisa v Chacha Muhogo**, Civil Appeal No. 161 of 2016, CAT). Mr. Kaunda argued further that DW1's account was not credible as he lied to the court when he said that he never knew the appellant while through Exhibit P3, the plaintiff ably proved that they knew each other and there was communication between them. The statement that PW1 never knew DW1 was a total lie and wholly discredited the PW1's story. Having lied to the court, PW1 cannot be trusted. His evidence should be disregarded and the appeal be allowed.

In reply, Mr. Kisyeri Cosmas, counsel for the respondent, submitted that there is nothing to fault the decision of the lower court as it was well founded and based on the evidence rendered in court. PW1 admitted that she did not know the respondent but they were communicating. Also, PW2, stated that the respondent never went to their offices. Exhibit P1 was unreliable as there was no proof that it was served upon the respondent. Its reply, Exhibit P2, was also from a person other than the respondent. The bank statement, exhibit P3 was dated April hence irrelevant to the suit as per paragraph 4 of the plaint, the agreement duration was between May and August.

Mr. Cosmas proceeded that the respondent never admitted to have been issued the tickets. Thus, the failure to cross examine is irrelevant. He added that, the appellant ought to have proved his suit on the balance of probabilities as stated in **Charles Christopher Humphrey Richard v Kinondoni Municipal Council**, CAT, Civil Appeal No. 125 of 2016, where it was held that the burden lies upon the plaintiff to prove her case. With regard to the third ground of appeal, he argued that it is devoid of any merit as the issues for determination were framed and are all reflected in the

judgment. The issue of WhatsApp and email was not alien as it was just for the plaintiff to prove that her claims were genuine.

Rejoining, Mr. Kaunda reiterated that PW2 and the respondent knew each other. And, as the plaintiff was operating as a company, it was sufficient for the respondent to be known by PW2 only. He proceeded that the bank statement does not contradict the appellant claims as it was tendered to show that the appellant and the respondent had business transaction in the past. Lastly, he added that, as the contract between the parties was oral, emails and WhatsApp messages were irreverent.

I have carefully considered the submission and the lower court records placed before me. The appellant's major discontentment is that the court treated him unfairly by dismissing her suit for want of proof while he successfully proved her case to the required standards. Thus, the ultimate question to be answered by this court after considering the three grounds of appeal is whether the appellant's case in the trial court was indeed proved to the required the standards. Building her case, on the first ground of appeal

she has complained that the decision was erroneous as the evidence in favour of her claims was unfairly weighed.

As correctly submitted by Mr. Cosmas, in civil cases, the legal and evidential burden rests upon the plaintiff and the standard required is proof on the balance of probabilities. The principle derives from section 110 (1), (2) and section 112 of the Evidence Act [Cap. 6 R.E. 2019], which states that:-

> "110(1) 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 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
> 112. The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence/ unless it is provided by law that the proof of that fact shall lie on any other person. "

Expounding this principle in ***Paulina Samson Ndawavya vs Theresia Thomasi Madaha***, Civil Appeal 45 of 2017 (at the Court of Appeal stated that:

> It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.

Having stated the applicable principle, I will retreat and proceed to the third grounds of appeal while I reserve the first ground to be determined last.

Regarding the third ground of appeal, framing of issues for determination is basically concerned with the ascertainment of material proposition of fact or of law to which the parties are at variance and recording of such materials, is one of the core functions of a trial court. The law treats this function with significant importance and requires, under Order XIV rule 1(5) of the Civil Procedure Code [Cap 33 R.E. 2019], that it be performed prior to commencement of hearing. It is also settled that, much as there is room for amendment or framing of fresh issues at a subsequent stage pursuant to Order XIV rule 4 and the 5(1), respectively, the framing of issues or amendment of the same, should not be done without according the parties

the right to be heard prior to the amendment or framing of the new issue. Framing of issues or amendment of issues without affording the parties an opportunity to be heard constitutes a fatal anomaly capable of vitiating the proceedings as held in **Wagesa Joseph M. Nyamaisa v. Chacha Muhogo** (supra).

In the present case, it is undisputed that on 5/1/2020 when the parties appeared for Final Pre Trial-Conference, the court framed the following three issues as issues for determination, namely: *whether there was a contract between the parties; whether there was breach of the same by the parties and what relief(s) are the parties entitled to*. The appellant's counsel has passionately argued that, in addition to these issues, the court framed a new issue and determined the same without affording the parties the right to be heard. In my scrutiny of the record to discern the credence of the appellant's complaint, I was unable to discern any. As correctly argued by Mr. Cosmas, there was neither framing of a new issues or amendment of the three issues above.

The finding on email and WhatsApp messages was not a new issue but an elucidation of the materials necessary in proving the existence of the contested agreement and the breach of the same. As the plaintiff alleged that the orders were placed through emails and WhatsApp messages it was correct for the learned trial magistrate to address his mind to the presence or otherwise of the printout of such emails and WhatsApp message. Thus, he cannot be faulted. The 3rd ground of appeal, is devoid of merit and fails in entirety.

On the second ground of appeal the appellant has challenged the challenged the learned trial magistrate's enquiry on electronic evidence and has argued that the existence of emails and WhatsApp messages were not controverted. Hence it was wrong for the trial magistrate to stretch his mind to this fact which was presumably admitted as the defendant and his counsel never cross examined the plaintiff's witnesses on this point.

I entirely with Mr. Kaunda's submission as regards the failure by a party to cross examine a witness on a material fact. As he has correctly submitted, it is a common position in our jurisdiction that, where a party or his advocate

fails to cross examine a witness on an important point/fact, he may be deemed to have accepted such fact/point and may be estopped from asking the court to disbelieve the respective point. Expounding this principle in **John Shini v R** (supra), the Court of Appeal stated that:

> It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth.

In the present case, the record demonstrates that while testifying in chief, PW2 stated that the tickets were issued through WhatsApp and in the course of cross examination, he told the court that the tickets were sent through WhatsApp messages. In the light of this record, it is certainly incorrect to argue that PW2 was not cross examined as that would directly contradict the evidence transcribed on page 15 and 16 of the word-processed trial court's proceedings. In the foregoing, I am constrained to hold that much as the case of **John Shini v R** (supra), represents the correct position of law as it applies in our jurisdiction, it was mistakenly cited as the witness was cross examined.

As to whether the court was justified in its finding as regards the plaintiff's failure to produce the printout of the email and WhatsApp messages, having found that the PW2 was cross examined on the WhatsApp messages and considering what I have already said while answering the first ground of appeal, I see no reason to fault the trial magistrate and I entirely subscribe to his observation that, as the tickets sent to the defendant by PW2 were allegedly sent through emails and WhatsApp messages, it was crucial for the appellant to produce the printout of such emails and WhatsApp messages in substantiating her claim. I may also add here that, at the very least, the plaintiff would have specified the mobile number and the email address through which she sent the tickets to the respondent but none was produced. The second ground of appeal, consequently, fails.

Reverting to the first issue, exemplifying the appellant's discontentment, Mr. Kaunda has urged that, there were sufficient evidence that the parties had business transaction. It was not controverted that PW2 and the respondent knew each other and had transacted as shown through the bank statement which was tendered to show previous business transaction between the parties. Lastly, he argued that, the respondent was not credible as he lied to

the court when he said that he did not know PW2 whereas all the evidence on record sufficiently demonstrate that they were familiar.

Having examined the evidence on record, I have established that much as the respondent might have lied about his familiarity with PW2, there was no sufficient evidence on record for the lower court to sustain the appellant's claims. As the record will credibly reveal, apart from being insufficient, the plaintiff's evidenced was contradictory and subject to serious doubts as to whether the claims were against the Aman Masue (the respondent herein), Omari Masood (as per PW1 testimony) or Maredori Travels and Tours (as per Exhibit P2). As admitted by Mr. Kaunda, the bank statement admitted as Exhibit P3, serve no purpose other than demonstrating that the parties transacted in the past.

Similarly inconclusive was Exhibit P4 as, apart from bearing the respondent's name on the first page, it does not any how show its connection with the case. It neither bears a title or anything to show that it originates from the plaintiff. Exhibit P1 could have possibly attracted some weight. However, when read conjointly with Exhibit P2, they entertain the doubt observed by

the trial magistrate as they materially contradict on whether the claims were against the defendant or Meredoli Travelers. Of utmost interest is the testimony of the plaintiff. Testifying as PW1, she told the court that:

> "I am here as I claim from Omary Masoud the defendant who was the customer, and sub agent who was doing business at Mwanza Branch. Omary took air ticket and he did not pay, I make follow-up but it was in vain."

With this evidence from the plaintiff herself, I am puzzled under which miracle would have the court sustained the claim against Amani Masue, the respondent herein while the defaulter is Omary Masoud. Unless there was evidence that, Aman Masue was one and the same as Omary Masoud, no court would implicate the respondent for breach of contract. Needless to emphasize, the success of the appellant's claims did not depend on the respondent's credibility or the weakness of his case. It was dependent upon the plaintiff ability to discharge her burden of proof on the balance of probabilities. As held in **Paulina Samson Ndawavya vs Theresia Thomasi Madaha** (Civil Appeal 45 of 2017, CAT

> It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges

his and that the burden of proof is not diluted on account of the weakness of the opposite.

As the appellant in this case miserably failed to discharge her burden of proof, she has none but herself to blame. The upshot of the foregoing is that, this appeal is abounded to fail and it is hereby dismissed with costs.

DATED at DAR ES SALAAM this 22nd day of July 2022

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE