

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 12 OF 2022

*(Arising from the Judgement and Decree of the District Court of
Ilemela at Mwanza in civil case No. 1 of 2021)*

HUSSEIN RAMADHAN-----APPELLANT

VERSUS

ISAYA PHARES-----RESPONDENT

JUDGMENT

Last Order: 22.09.2022

Judgement Date: 30.09.2022

MASSAM, J.

The appellant in this appeal is appealing against the decision of the District Court of Ilemela in civil case No. 1/2021 which was decided in favour of the respondent: Briefly, it goes that the appellant instituted a case among other things claim for payment of Tshs. 21,214,6000/- being the debt agreed to be paid by the respondent within one week from 14/10/2018 an act which the respondent did not honour. The particular agreement was entered into a written contract, that debt arises out of fish business/ transaction of which the respondent neglected to pay the debt and at the end, the trial court finds appellants case lack merit has he failed to prove his case as per the required standards.



Aggrieved by the decision, appealed before this court giving five grounds of appeal as follows:

1. That the trial court erred in law and in fact by deciding in favour of the Respondent while the case against the latter was proved to the required standard.
2. That the trial court erred in law and in facts by holding that the contract of the acknowledgement exhibit "P1" itself cannot solely and sufficiently prove the case against the Respondent without calling the TFP Factory Authority while the same was not privy to the said contract.
3. That the trial court erred in law and in facts by holding that the Respondent did not enter and/or signed the contract of the acknowledgement, exhibit "P1" while that issue was not placed for the determination before the trial court.
4. That the trial court erred in law by allowing the Misc. Civil Application Number 2 of 2021 which is based on hearsay evidence.
5. That the trial court erred in law for determining the case without analysing and evaluating evidence of both sides and the evidence of the appellant in particular

When the matter was called for hearing the appellant had the service of Mr. Musa Nyamwero advocate, while the respondent enjoyed the service



of Mr, Mwanaupanga advocate. By the consent of the parties, this appeal was heard by way of written submission.

Submitting to his appeal on the 1st ground, he said that the trial court erred in law and facts by deciding in the favour of the respondent while the case was not proved to the required standards. As it is a well-settled principle that the burden of proof lies on the one who alleges the existence of the certain fact as well as it was articulated in the case of **Barelia Karangirang verse Asteria Nyalwambwa** Civil Appeal No. 237 of 2017 CAT Mwanza Registry in page 7 as it was held that:-

“we think it is pertinent to state the principle governing proof of case in civil suits, as found from sections 110 and 111 of the law of evidence Act”.

Also, he said that exhibit P1 was tendered and admitted by the trial court without any objection so its contents are also admitted. He supported his argument with the case of **Kilombero Sugar Company Limited vs. Commissioner General [TRA]** Civil Appeal No. 26 of 2018 CAT on page 11 which held as that: -



"what it says is that whenever a document is admitted in course of trial without objection, that contents of the documents are also admitted."

Later on, he said that the appellant did discharge his duties toward proving the requisite claim of the amount of Tshs. 31,214,600/- and no doubt that appellants' evidence adduced at the trial court was heavier than that of the respondent and being the 1st appellate court has the power to step to the shoes of the trial court, and come up with independent findings as held in the case of **The Registered Trustees of Joy in the Harvest vs. Hamza K. Sungura** civil appeal No. 149 of 2017 CAT Tabora.

Again, he submitted on the 2nd and 3rd grounds of appeal jointly that the court erred in law and fact by deciding that the contract of acknowledgement of debt promissory note (exhibit P1) cannot solely and sufficiently prove the case against the respondent without calling the TFP Factory Authority, Also he said that in page 12 the issue was whether the defendant [respondent] is indebted by the plaintiff [now appellant]. In the issue of whether the fish was delivered to be TFP, there was no evidence showing how payment was done by the TFP factory Authority in favour of Christopher Masanga [DW2] and the contention that the respondent did not



sign the contract of the acknowledgement note was not raised in the respondent's written statement of defence, so the trial court had no jurisdiction to raise new issues in the course of composing the judgment rather than those issues framed and agreed by the parties. Lastly, he submitted that TFP and Christopher Paulo Masanja were not privy to the contract note as reflected in exhibit P1, so they were not a material witness to prove the case.

Responding to the appellant's submissions, Mr. Mwanaupanga learned counsel for the respondent conceded with the appellant's learned counsel submission that exhibit P1 was not objected but the oral evidence from PW1 does not support his case as there was no evidence to the effect that it was supplied with fish, no evidence from the advocate who prepared the contract, and the witness on the part of appellant testified against him. At page 16 of the proceedings, he said that:-

"...I was told Christopher Paul Masanga that he was paid that money but I do not have any proof of receipts, I was told by the accountant of TFP that the money was deposited to TFP".

So according to that, he pray to join hand with the reasoning adduced by the trial court on its findings that the appellant failed to discharge his

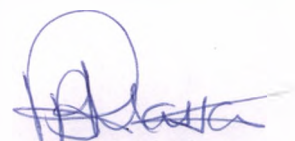


burden of proof considering the fact that, it was the appellant himself with Isaya Phares Paulo Masanja in absence of TFP who executed the contract.

In replying to grounds number 2 and 3 of the appeal he submitted that, the trial court was faulted by failure to acknowledge exhibit P1 as to him, he believed that there was no need to have evidence of whether fish were delivered to the TFP factory or that payment were made in respect of the consignment delivered.

Lastly, he said that in absence of testimony from TFP to supplement the plaintiff's evidence and lack of evidence to show how payment was done in favour of Christopher Masanja, makes exhibit P1 to be not sufficient to prove the plaintiff's case.

In his rejoinder, the appellant's counsel submitted that he still maintain his previous submission that civil case number 1 of 2021 was instituted after the respondent failed to honour the written promissory note as indicated in the contract of acknowledgement of a debt [exhibit P1] and said promissory note does not impose any obligation to the appellant to supply the fish at TFP factory, rather it is a contract of the acknowledgement of debt undertaken between the appellant and the respondent, and in that the TFP factory was not privy to the said contract so appellant did discharge his duty



towards claiming of Tshs. 31,214,600. Regarding the 2nd and 3rd ground of appeal he still maintains that the appellant and responded pleadings bears no ma]terial facts in respect of whether the fish was supplied to the TFP factory and they disclose no particulars how the payment was done in favour of Christopher Paulo Masanja [DW2] and trial court frame no issue for the determination in respect of the same contention, so the trial court erred adjudged that was a need to call the TFP factory as the appellant's witness so he submits that his appeal has merit to be allowed.

I have considered the record of appeal exhibit P1 submissions for and against the appeal from both learned counsels the pertinent issue for determination is **whether the appeal has merit.**

The duty of this court is to weigh the evidence brought by parties and determine whether the evidence proved the case. On the side of the appellant submitted to this court that, he succeeded to prove his claim of the amount of Tshs. 31,214,600/- as exhibit P1 which was a promissory note was tendered without being objected to, and itself is sufficient to prove his case against the respondent without calling the TFP factory, Authority. In the respondent disagreed with that submission, and said that he conceded that exhibit P1 was not objected to the trial court, but that alone cannot



prove the case, because the evidence of appellant [PW1] did not support his case as there was no evidence from TFP factory authority that it was supplied with the fish. From the record of the trial court, this court is in support of the submission of the respondent that, the evidence of PW1 did not collaborate with the evidence of any witness than exhibit P1 which has some legal defects. By looking to be said exhibit "P1" parties agreed that one Christopher Paul Masanja will be a witness of Hussein Ramadhani, and one Peter Jacob Nkondo and Mansa Sanga will be witnesses of one Isaya Pharest, the respondent but in the said agreement, one Christopher Masanja used to introduce Hussein Ramadhani to the advocate who attested that agreement.

The law is settled that he who wants the court to consider that certain facts exists has the duty to adduce evidence to that effect, See the case of **Dr. A. Nkini and associate Limited vs. National Housing cooperation** Civil Appeal No. 72 of 2015, **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014. Also, this court found out that an important witness to testify on the missing gaps to the evidence of PW1 was not called who was the advocate attested the said agreement. That advocate was an important witness to testify and prove



that he was the one who attested that agreement, and the parties signed that document before him. Also, the witness from TFP was not called testify that, the said date they were supplied with fish from the appellant. This is supported by the case of **Hemedi Saidi vs. Mohamed Mbilu** [1984] TLR 113 where it was held that:-

"...where for undisclosed reasons, a party fails to call a material witness on my side, the court is entitled to draw an adverse inference that if the witness were called they would have given evidence contrary to his interest".

Similarly, in the case at hand, I accordingly draw an adverse inference that the failure of the appellant to call the witness from TFP, factory and the advocate who attested in that agreement, indicates that if they were called they would have given evidence contrary to her interests.

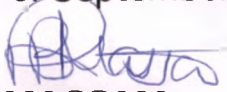
Again, the witness who was agreed in the agreement to be a witness of the appellant who was one of the key witnesses of the plaintiff case was called by the defendant[respondent] to be [DW2] and in his testimony denied to have been paid any money by TFP factory and he was never been the part of any contract with either party.



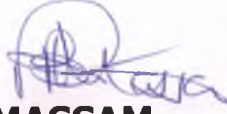
For the foregoing reasons, I find that the sole ground of appeal had not been substantiated by the appellant as urged by the respondent and as a result, I dismiss the appeal in its entirety with costs.

DATED at **MWANZA** this 30th day of September 2022.




R.B. MASSAM
JUDGE
30/09/2022

COURT: Judgment delivered on 30th day of September 2022 in the presence of Musa learned advocates for the appellant and Masoud Mwanaupanga for the respondent.


R.B. MASSAM
JUDGE
30/09/2022