THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CIVIL APPEAL NO. 09 OF 2021

(From Momba District Court at Chapwa in Civil Case No. 03 of 2020)

REBECCA NAWALE.....APPELLANT

VERSUS

WILLY ANGULILE MWAKABENGA .....RESPONDENT

EX PARTE JUDGEMENT

Date of Last Order: 17/08/2022
Date of Ruling : 05/10/2022

MONGELLA, J.

The respondent instituted a suit in the district court of Momba at Chapwa against the appellant and another person named Jackson Albert. He claimed against them, among other things, a sum of T.shs. 13,272,000/- as specific damages, and T.shs. 17,000,000/- as general damages. The claim emanated from an alleged agreement to store crops at the appellant's store. The respondent claimed that sometime in June 2018 he requested for storage of maize and sorghum at the appellant's store. He found the said Jackson Albert who told him that the store was empty and therefore they agreed on the payment and for him to send the maize there. The said Jackson was employed by the appellant as the storekeeper and guard. The agreed price was T.shs. 300 for each sack.

He thus took to the store 550 sacks of maize and 150 sacks of sorghum. The crops stayed there for 3 months. When he went to put pesticides he found only 150 sacks of sorghum and 224 sacks of maize. The missing sacks of maize were 336. The appellant claimed that it was the said Jackson who took the maize. The trial court exonerated the said Jackson Albert from liability. It however, found the appellant liable and awarded the respondent T.shs. 8,000,000/- as general damages; T.shs. 13,272,000/- as specific damages with interest at 10% rate per annum from July 2018 to the date of delivery of the judgment, that is, on 17.06.2021 and till full payment. The appellant was disgruntled by the trial court decision, hence the appeal at hand on five grounds, to wit;

1. That the trial court erred in law and fact for raising and determining a new issue which was not raised and contested by the parties.

2. That the trial court erred in law and facts for failure to properly evaluate the evidence of the appellant hence wrongly decided the case in favour of the respondent.

3. That the trial court erred in law and facts to hold in favour of the respondent, who failed in entirety to prove his case on balance of probability in his case.

4. The trial court erred in law and facts to hold that the second and first defendants are principal and agent hence reached a wrong decision in favour of the respondent.

5. That the trial magistrate erred in law and facts to hold in favour of respondent who failed to summon potential witnesses to prove on potential issues.

On 10.02.2022 the Court ordered parties to argue the appeal by written submissions. The appellant was scheduled to file his submission on or before 24.02.2022; the respondent was to file reply submission on or before 10.03.2022; rejoinder by the appellant, if any, was to be filed on or before 17.03.2022. When the matter came for necessary orders on 24.03.2022 the appellant notified the court that she could not file the rejoinder as she was served the reply submission by the respondent on 18.03.2022. Upon scrutiny of the court record, it was revealed that the respondent had defaulted in filing his written submission as ordered by the Court. The default equals non-appearance in a hearing in court. The matter therefore proceeds *ex parte* against the respondent.

The appellant was represented by Mr. Isack Chingilile, learned advocate. In his submission, he dropped the 1st ground of appeal. The 2nd and 3rd grounds of appeal were argued jointly. Mr. Chingilile submitted that at commencement of trial one of the issues framed was "*whether there was a rental contract of warehouse between plaintiff and two respondents to store 336 sack (sic) of maize.*" He argued that this issue was framed following denial by the appellant in her Written Statement of Defence (WSD) the averment in the Plaint to the effect that in June 2018 the respondent entered in rental agreement with the 2nd defendant to store 336 sacks of maize but when went to collect, he found that the store was empty.

Mr. Chingilile argued that the respondent who was the plaintiff in the trial court had the duty to lead evidence to prove the facts pleaded to the effect that he entered into a contract to rent a warehouse for storing the purported 336 sacks of maize and that the contract was breached. He referred the case of ***Mexon's Investments Limited vs. DTRC Trading Company Limited***, Civil Appeal No. 91 of 2019, in which while referring to its previous decision in the case of ***Barclay's Bank vs. Jacob Mano***, Civil Appeal No. 357 of 2019 (unreported) the Court held, among other things, that each party is bound by own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made; and that the court is also bound by the parties' pleadings as they are.

Addressing the respondent's testimony vis a vis the above established rule, he argued that the respondent testified that the sacks of maize were 550 and those of sorghum were 150 and when he went for putting pesticides he found 150 sacks of sorghum and 224 sacks of maize whereby 336 sacks of maize were missing. He added that the same version was repeated by PW2 and PW3. In the premises, he was of the view that the pleading by the respondent was not proved and the trial court failed to analyse that.

Considering the appellant's evidence, he argued that it was undisputedly testified by DW1 and DW2 that at the alleged time the 1st defendant (the appellant herein) was on maternity leave. He contended that this fact was also corroborated by PW1, the respondent, who testified to have found the said Jackson, the purported storekeeper and employee of the appellant. He said that, on the other hand, when PW1 was cross examined, he said that he did not know if the 2nd defendant, the said

Jackson, was allowed to act on behalf of the appellant. He added that PW1 failed to prove that he had a rental contract or whether he really called the appellant on his intention to rent the warehouse until when he tried to call her three months later.

He further challenged the respondent's testimony to the effect that he reported the appellant and the said Jackson at Tunduma Police Station whereby the appellant paid him a sum of T.shs. 1,000,000/- with the aim of reducing the loss suffered. The basis of his challenge is that there was no any RB Number, statement or agreement at the police which was tendered by the respondent as evidence. He was of the opinion that such documents would have provided the best evidence in proving existence of legal relationship on the purported oral contract between the parties. In the absence of an agreement he as well challenged the testimony of PW3 saying that he witnessed nothing between the parties.

Mr. Chingilile further challenged the consideration of the contract on the ground that there was inconsistency in the respondent's evidence. He argued so saying that during examination in chief, PW1 stated that the consideration was T.shs. 300 per each sack of maize, but later changed and said that he paid T.shs. 1,500/- per each sack to the appellant. He was of the view that it is not clear as to the number of contracts entered by the parties and the trial court failed to analyse that.

He further challenged the respondent's assertion that he took sacks of maize to the appellant's warehouse. He had the stance that the same is negative on the face of record. He argued so saying that while PW1

stated that the sacks of maize were sent to the appellant's store whereby they were directly transported by car from Sumbawanga to the appellant's store; PW2 on the other hand, testified that he was the one who sent the maize sacks through his employer to the appellant's store and he used a bicycle for several days to transport the maize and that he went to the store to crosscheck. However, when cross examined, he said that he stated that he took 550 sacks of maize from Tazara and 350 sacks from Sumbawanga. He added that PW2 kept changing the story whereby he then said that the sacks of maize were first kept at one Queen Mwampamba before being sent to the appellant's store. That PW2 then said the maize sacks were transported slowly by motorcycle and bicycle and it was Willy (the respondent) who told him to take the maize to Queen at Mwaka area as it was near the road and easy to pack them in a car. That when they failed to get customers they decided to send the maize to the appellant's store by bicycle.

Considering the contradictions as above, Mr. Chingilile had the stance that the contradictions go to the root of the case thus shaking the credibility of the witnesses. He added that the respondent's evidence failed to prove the case on balance of probabilities as important questions were left unanswered. These questions regard: the place where the subject matter was transported from; the number of items; the type of transport used; the person who delivered the goods at the store; the number of stations used to pause before reaching the store; the number of manpower engaged to load the maize; and the person who shifted the maize from Queen Mwampamba. He faulted the trial Magistrate for failure to evaluate all these questions. He referred the case of ***Africarriers***

Limited vs. Millenium Logistics Limited, Civil Appeal No. 185 of 2018 (CAT at DSM, unreported) and that of ***Ernest Sebastian Mbele vs. Sebastian Sebastian Mbele & 2 Others***, Civil Appeal No. 66 of 2019, in which it was held that contradictions that go to the root of the matter blemish the evidence and taint the witness' credibility."

In conclusion, he argued that the respondent failed to comply with the mandatory requirement of **section 110 (1) and 111 of the Evidence Act, Cap 6 R.E. 2019**, which provides that the one who alleges must prove on balance of probabilities. He faulted the trial court decision for being in favour of the respondent on the ground that it was arrived upon failure to examine the evidential value of the appellant's evidence. He considered the appellant's evidence as being very clear to the effect that no contract was entered between her and the respondent. That, the two never entered into any business relationship or communicated with the respondent. That, the appellant denied the said Jackson being her storekeeper and the same was corroborated by DW2. That, the said Jackson (DW4) was only engaged to load crops in vehicles "*kuli*" up to February and never mentioned the store he was working. He added that DW4 testified to have left Tunduma in February 2018 and the said fact was not cross examined by the respondent's counsel, which entails acceptance of the said fact. He was of the view that the appellant proved her case in accordance with **section 112 of the Evidence Act**, which provides that "*the burden of proof as to any particular fact 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 other person*."

As to the 4th ground, the argument was that there was no fiduciary relationship between the appellant and the 2nd respondent (Jackson Albert) and he was not acting in the office of the appellant in any position. He argued that though DW2 testified to be working for the appellant at the store, DW4 testified that his work was to load crops on vehicles "*kuli*" in Zambia. He added that the respondent's evidence is silent as to what happened to Jackson when he was reported to Tunduma police station and as to the end result of the purported criminal case. He was of the view that if the respondent searched for Jackson for theft allegation then it means he knows his thief.

On the 5th ground, the controversy lies on the pleadings, particularly as to the amount of sacks and proof in that respect. He argued that the respondent had to prove on offer and acceptance to store the said sacks of maize and on delivery of the maize at the appellant's store. As argued under the 2nd and 3rd grounds, he challenged the testimony of PW1, PW2, and PW3 as all of them claimed to have taken the maize to the respondent's (sic) store by using different means of transport. He added that key witnesses, that is, the drivers of the motorcycle and bicycle riders, were not brought to court to testify. He invited the Court to be guided by the decision in the case of ***Jabil Kausaral Turabali vs. Kaini Nyigu***, Civil Appeal No, 09 of 2020 (HC at Iringa, unreported); and that of ***Hemed Said vs. Mohamed Mbilu*** [1984] T.L.R. 133, in which it was ruled that failure to summon a key witness creates an adverse inference against the party who ought to have called the witness.

After considering the grounds of appeal, the submission by the appellant's counsel and the trial court record, I shall determine on the grounds of appeal collectively under one main issue as to whether the claims by the respondent were proved to the required standard, that is, on balance of probability. The position of the law is to the effect that the one who alleges must prove. This means that the party to a suit who alleges certain facts has the duty to prove the existence of those facts. This is provided under **section 110 (1) and (2) and section 112 of the Evidence Act, Cap 6 R.E. 2019** which states:

> *"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 fact 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."*

The legal position as settled above was reiterated and emphasized by the CAT in the case of ***Geita Gold Mining Ltd. & Managing Director GGM v. Ignas Athanas***, Civil Appeal No. 227 of 2017 when revisiting its previous decision in ***Anthony Masanga v. Penina (Mama Mgesi) & Another***, Civil Appeal No. 118 of 2014, (CAT, unreported).

It is trite law that parties are bound by their own pleadings. In that respect no party is allowed to present a case contrary to its pleadings. See: ***Yara Tanzania Limited vs. Charles Aloyce Msemwa & 2 Others***, Commercial Case No. 5 of 2-13 (HC at DSM, Comm. Div. unreported); and ***Jovent Clavery Rushaka & Another vs. Bibiana Chacha***, Civil Appeal No. 236 of 2020 (CAT at DSM, found that Tanzlii). In the matter at hand I find that the facts alleged in the plaint were not proved. While in the plaint the plaintiff/respondent averred that the contract was to store 336 sacks of maize and that he found nothing when he went at the store; in his testimony during trial he claimed that the contract was to store 550 sacks of maize and 150 sacks of sorghum; and that he found 150 sacks of sorghum and 224 sacks of maize when he went to put pesticides. The respondent's testimony cannot be accepted as it is contrary to what was asserted in the pleading, and no amendment was done to that effect.

Further, there was no any agreement between the parties presented in court to show the terms and conditions. The plaintiff/respondent testified that he used to record the sacks taken to the store; however nothing was furnished in proof. PW3, a police officer named Ally testified that he witnessed the agreement between the parties at the police station, which was recorded. The agreement was to the effect that the appellant would pay for the stolen maize and the appellant paid an advance of T.shs. 1,000,000/-. However, no agreement was presented in court and no explanation was provided as to the whereabouts of the said agreement. PW3 further stated that he witnessed the return of the said T.shs. 1,000,000/- by the respondent to the appellant. In the premises, it surprises that if the said agreement was indeed finalised why the money would be

returned if the same was given to the respondent in compensation of the stolen maize.

There was further evidence from the respondent/PW1 and PW3 that a police officer named Shabani witnessed and supervised the agreement between him and the appellant to repay the stolen maize. This officer was therefore a key witness, but was never presented to testify in court. It is trite law that where a party fails to furnish a key witness in his favour, the court can draw an adverse inference against that party to the effect that had such witness been summoned, he/she would have given evidence in disfavour of the party supposed to furnish the said witness. See: ***Ebrahim Kassam t/a Rustam & Brothers vs. Maro Mwita Maro***, Civil Appeal No. 76 of 2019 (CAT at DSM, unreported).

The respondent claimed to have worked with one Jackson in storing the crops at the appellant's store. He claimed that the said Jackson was the appellant's employee entrusted to do the work on her behalf. This assertion was however not proved. The appellant denied employing the said Jackson. He said that he was just a porter and that when she was at home on maternity leave, she let the store under the supervision of her relative, one named Justine. The said Justine testified as DW2 in corroboration of the appellant's testimony that the store was left in his care. The said Jackson testified as DW4 whereby he denied entering into any storage contract with the respondent. He agreed that he was not in charge of the store but just a porter loading and offloading goods from vehicles. He denied entering into any agreement with the respondent.

The respondent claimed to have made payments for the storage of the crops at the appellant's store. In the circumstances, and in consideration that the appellant and her witnesses denied his claims, he ought to have furnished proof of the payments he made to the appellant for the storage of the crops. Nothing was presented to prove the alleged payments. In addition, the appellant gave contradictory statements whereby at one point he claimed to have paid T.shs. 300/- for each sack and at another point he claimed to have paid T.shs. 1,500/- per each sack. The law is trite that contradictions in the witness' testimony put the credibility of the testimony adduced in question. See: ***Ernest Sebastian Mbele vs. Sebastian Sebastian Mbele & 2 Others***, Civil Appeal No. 66 of 2019 (CAT at Iringa, reported at Tanzlii).

In the premises, I find that the respondent failed to prove his claims in the trial court and that the trial court failed to analyse property the evidence on record. I therefore quash the trial court decision. The appeal is allowed with costs to be borne by the respondent.

Dated at Mbeya on this 05th day of October 2022.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA

JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 05th day of October 2022 in the presence of the respondent, Mr. Kevin Kuboja Gamba, holding brief for the appellant's counsel; and Ms. Janet Chang'a holding brief for the respondent's counsel.

L. M. MONGELLA

JUDGE