IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 20 OF 2021

(Arising from Civil Case No. 14 of 2019 originated from Geita District Court.)

SASA KAZI FUEL CO. LTD---------- APPELANT

VERSUS

FERRANT PROCESSING CO. LTD---------- RESPONDENT

JUDGMENT

Last Order: 24.02.2022
Judgment Date: 25.03.2022

M. MNYUKWA, J.

In this Appeal, the appellant Sasa Kazi Fuel Co. Ltd appealed against the decision of Geita District Court in Civil Case No. 14 of 2019 before Hon. Katemana SRM. The facts of the case is very straight forward, It goes that, the appellant (plaintiff in trial court) instituted a case against the respondent (Defendant in trial court) claiming a total of Tsh. 53,260,000/= being unpaid amount arising out of supplied fuel contracts which were ordered by the respondent and delivered by the appellant. That the appellant also claiming USD 5,097.60 against the respondent being an outstanding balance of the agreed costs for hiring the appellant's

motor vehicle for the respondent mining activities from 4th October 2016 up to 8th March 2017. Through his written statement of defence the respondent denied the claim on the reason that the claim is invalid as it based on invalid tax invoices and delivery note and that there was no any agreement in existence between the parties and that they have never entered into any agreement with the appellant that would obliged the respondent to carry out the contractual obligations on the proposed hired motor vehicle, and that if there was any binding contract the appellant could have attached it in the plaint.

In the trial court, the matter was heard ex-parte due to non-appearance of the respondent after the matter has been adjourned for several times, which necessitated the issue last adjournment order. On the date fixed for hearing, the defendant did not enter appearance which resulted to appellant's prayer to be granted for the matter to be heard ex-parte.

During the hearing, the appellant brought one witness to prove his case and tendered 6 exhibits. At the trial court, PW1 testified as a chief administrator of the appellant company. He stated that he worked with the appellant company for about 32 years and that they used to supply fuel to the respondent. He went on testified that the respondent used to request fuel through email correspondence and that the proof of

delivering fuel is the order book that was signed after delivery and that the email correspondences were done by the director of the appellant and the director of the respondent. PW1 tendered email conversation which were admitted as Exhibit P1 and P2 collectively. He went on that they have good business relationship with the respondent and they used to pay. He added that the last invoices that has been acknowledged by the respondent though he did not pay, was the invoice that was admitted as Exhibit P3. PW1 further testified that, apart from the invoices they also signed delivery note and that after supplying the fuel, respondent acknowledged the claim though they did not pay and he tendered email conversation to prove the same that was admitted by the trial court as Exhibit P4. He remarked that the total amount of claim is Tsh. 53,260,000/= and that apart from fuel business they also hired vehicle in which their last claim of USD 5097 was not paid though the debt was acknowledged. PW1 tendered an email that was admitted as exhibit P5. He ended his testimony by stating that, the total claim was Tsh. 53,260,000/= and 5097.60 USD and that they wrote demand notice which was admitted as exhibit P6.

After hearing of the matter, the trial court found that the appellant failed to prove if there was contract between the parties and also failed

to prove the appellant's claim. He therefore dismissed the claim in its entirety.

Aggrieved, the appellant lodged an appeal to this court by presenting the memorandum of appeal challenging the decision of the trial court with five grounds of appeal as follows; -

1. *That the trial magistrate erred in law and in fact by disregarding Exhibit P1, P2, P3, P4 P5 and P6 which were tendered by the appellant's witness regarding the valid contract between the appellant and the respondent by the virtual of established conduct of the parties.*
2. *That the trial magistrate erred in law by not considering appellant's EFD receipts, delivery notes and invoices that were admitted as exhibit P-3 taking into account that there is no evidence on record to show if the issued invoices were paid by the respondent.*
3. *The trial magistrate erred in law by relying on the respondent's letter (Exbibit P6) titled defeat/deny the appellant's claim against the respondent.*
4. *That the trial magistrate erred in law and in fact by misdirecting itself regarding the respondent's act of acknowledging debt by considering exhibit P1 and P2 while the issue of admission was proved by Exhibit P4.*

5. *That the trial magistrate erred in law and in fact by failing to take into account that all e-mail correspondences admitted as exhibit P1, P2, P4 and P5 were made using respondents' e-mail address and/ or internet domain.*

The appeal was argued orally whereby the appellant had a service of Ms Marina and Mr. Gwakisa Gervas, learned advocates and the respondent afforded the service of Susan Gisabo learned advocate. The appellant learned counsels were the first to submit and Mr. Gwakisa learned advocate opted to combine the 1st and the 5th ground, and the prayer was duly granted.

On the 1st and 5th grounds of appeal, he submitted that there was a valid contract between the appellant and the respondent established by the way of conduct. Referring to page 2 of exhibit P4 he avers that the respondent through his e-mail address jlw@fernantprossesing.com sent an e-mail through his director named James Wheeler to the director of the appellant via his e-mail address sbmeral@thenet.com with the words

> *"Shafiq, please send 5000 litres of diesel to the site now. I am attempting to schedule the payment ASAP and I have product leaving next week. I'd also like a statement of account to see what is outstanding to you and how I can*

get this to scheduled for payment. Please confirm that this fuel truck will arrive in Nyarugusu tonight".

He avers that the e-mail was sent on 15.09.2018 at around 03.31 p.m and from what transpires between the appellant and the respondent is proof that they were doing business. He further narrates that the applicant responded to the above e-mail on 22.09.2018 as reflected on page 1 of exhibit P4 and accompanied with the statement of account as requested by the respondent which shows the outstanding amount claimed by the appellant from the respondent was Tsh. 53,140,000/= for the fuel delivered. Exhibit P2 reveals that, the appellant and the respondent were doing business from 02.12.2017 to 08.02.2018 and the respondent had already paid the appellant for five different orders amounting to Tsh. 68, 842,530/= and it is shown in the statement that the outstanding amount was Tsh. 53,140,000/=. He went on that, on 02.10.2018 the respondent replied to the appellant's e-mail requesting the appellant to be patient as the respondent was preparing for the payment and referring to page 3 of Exhibit P4, he avers that the respondent promised the appellant to pay the outstanding amount in one week.

He further submitted that, the e-mail being part of the electronic evidence, the appellant filed the same with the certificate of authenticity

accompanied by the affidavit deponed by Shafiq, the director of the appellant in compliance with section 18(2) of the Electronic Transaction Act, 2015.

He further avers that, exhibit P2 also an e-mail sent to the appellant by the respondent indicating two invoices paid by the respondent the same was from the domain of the respondent which also includes exhibit P5 which was the demand of payment by the appellant an amount of USD 5097.60 which was not disputed by the respondent. The learned counsel insisted that, there was a valid contract between the appellant and the respondent and prays these two consolidated grounds 1 and 5 to be allowed in consideration of sections 9 and 70 of the Law of Contract Act Cap 345 RE: 2019.

He went on citing pages 12 to 15 of the case of **Mexon's Investment Ltd vs DTRC Trading Company Limited** Civil Appeal No. 91 of 2019 and the case of **British American Tobacco Kenya Ltd vs Mohans Oysterbay Drinks Ltd** Civil Appeal No. 209 of 2019 that the same cases have a similar position as to this appeal which shows that there was a valid contract by the conduct of the parties. He, therefore, retires praying this court to allow the appeal.

On the 2nd ground of appeal, he submitted that the trial court erred by not considering exhibit P3 which includes tax invoice No. 77091 dated 11/09/2018 which had a total amount of Tsh. 13, 035,000/=, which the appellant supplied the fuel to the respondent which is supported with delivery note, and also a tax invoice no 77099 and 77207 accompanied with a delivery note and an EFD receipt which shows that, they were issued by the appellant to the respondent. He avers that, the same were tendered in copy after the appellant had filed a notice to produce on 17.08.2020 which was served to the respondent on 18.08.2020 for the original was at the custody of the respondent. He insisted that the trial court erred to evaluate the exhibits properly and prays this ground of appeal to be allowed.

On the 3rd ground of appeal, it was the appellant learned counsel submissions that, the trial court erred to rely on the respondent's letter Exhibit P6, a demand letter, to deny the appellant claims as against the respondent. He insisted that the demand letter was not part of the evidence rather a correspondence between the appellant and the respondent. And the denial by the respondent in the demand letter was not a justification for the court to form its decision that, the appellant's

claim was not valid. He, therefore, insisted that the court erred relying on the conversation and disregard the evidence by the appellant.

On the 4th ground of appeal, he submitted that the trial court erred for the reason that exhibit P1 and P2 were email correspondence between the appellant and the respondent in the cause of business but admission was made on exhibit P4 which the respondent did not deny the outstanding amount. He retires praying this appeal to be allowed with costs.

Responding to the appellant's submissions, Ms Suzan Gisabo learned advocate for the respondent denied the appellant learned counsel submission insisting that the trial court considered and analysed the evidence tendered. She went on insisting that, there was no misdirection of the fact or law as claimed since the trial court considered and scrutinized all email correspondence and properly find that they were not sufficient to establish a contractual relationship between the parties. On that basis, she prays the first and fifth grounds of appeal be dismissed.

On the second ground of appeal, she avers that the trial court properly analysed the exhibits tendered, the exhibits could not prove the case and she insist that the ground has no merit and prays the same to be dismissed.

On the 3rd ground, she submitted that, the trial court carefully considered the reply by the respondent to find that there was no any claim between the parties and there were no contractual relationships for the respondent to meet the demand of the appellant. Referring this court to page 6 of the trial court judgment, she insisted that the trial court found no legal basis of the appellant's claim against the respondent and gave reasons to the findings. Referring to the demand notice exhibit P1 and P2, and the reply exhibit P6, she insisted that they form part of the evidence for they were properly admitted. Referring to page 26 of the cited case of **Mexons Investment** (supra), she insisted that courts are bound by pleadings and exhibit P1, and P2 are part of the pleadings. She, therefore, prays this court to dismiss this ground for want of merit.

On the 4th ground, she avers that there was no misdirection by the trial magistrate as claimed for the trial court evaluated and analysed the exhibits tendered as reflected on page 7 of the trial court judgment and find out that the exhibits tendered could not prove the appellant's claim. She, therefore, retires praying this court to dismiss the appeal for want of merit with costs.

Re-joining briefly, the appellant learned counsel referred to page 4 of the trial court judgment insisted that, the trial court did not analyse the

contents of the exhibits on its decision. He insisted that all the correspondence done were by the way of email address with the domain name of the parties' companies and the appellant in tendering the exhibits filed the certificate of authenticity and an affidavit. He insisted that a mere denial by the respondent could not be sufficient to disprove the case against the appellant and for the reason that the matter proceeded ex-parte against the respondent, could not submit exhibits. He maintains his prayers that, this appeal is meritious and therefore this court to allow it with costs.

After the rival submissions by the learned counsels, I now stand to determine this appeal. Having in mind the position of law as stated in the case of **Amratlal D.M t/a Zanzibar Hotel Silk Stores Vs A.H. Janwala t/a Zanzibar Hotel** [1980] TLR 31, it was held that an appellate court should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or a violation of some principle of law or practice. Again, the law is settled that the first appellate court must reconsider and evaluate the evidence and come to its conclusions. The proceedings take the form of a re-hearing, where the court is entitled to re-assess the facts and form its conclusions based on the facts. (See **Mwita Sangali vs**

Republic, Criminal Appeal No. 266 of 2011 and **Pandya vs R** (1957) EA 336).

Guided by the above case laws, and after careful perusal to the court records and the submissions by the learned counsels, I find that the main claim confronted is whether there existed a contract between the appellant and the respondent. While the appellant insisted that the parties had a valid contract established by conduct, the respondent disputed.

To this regard, and before I embark on the grounds of appeal, I find it wanting to briefly make a thorough analysis on that regard. It is obvious that a contract may be reduced into writing and become a written contract and/or where the proposal and acceptance take a form of words becomes the oral contract and when acted for by the conduct of the parties is hereafter referred to as an implied contract.

This is the position of the law under Section 9 of the Law of Contract Act Cap 345 R.E 2019 which states: -

> *"In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express; and in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied."*

Again, under section 10 of the same Act above enlightens further that: -

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful*

consideration and with a lawful object, and are not hereby expressly declared to be void:
Provided that nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

In essence, the contract can therefore be in writing, oral or implied and the vital elements include free consent of the parties competent to contract, for a lawful consideration and with a lawful object.

In the appeal at hand, the appellant learned counsel submitted on the 1st and 5th ground of appeal claiming that the trial court erred holding that there was no valid contract between the appellant and the respondent established by the way of conduct. He gave reasons that, the tendered exhibits P1, P2, P3, P4, P5 and P6 established an implied contract between the appellant and the respondent but were not considered by the trial court. The respondent learned counsel objected claiming that the trial court considered and scrutinize all e-mail correspondence and properly find that they were not sufficient to establish a contractual relationship between the parties.

It is on records that the respondent at the trial court filed a Written Statement of Defence and the matter proceeded ex-parte as against the

respondent who did not appear. At the trial, to establish that there existed a contractual relationship, the appellant learned counsel tendered exhibits P1, P2, P3 and P4 respectively and when I go through the said exhibits, it is evident that there was a correspondence between the appellant and the respondent made by a way of e-mail concerning the business arrangements and transactions made from 2nd December 2017 to 17 September 2018. Based on the evidence by the appellant who claims to hold the email address sbmeral@thenet.com and the same testified that the other email address used in the correspondence that jlw@ferrantprossesing.com belongs to the respondent. The appellant managed to swear an affidavit and filed the certificate of authenticity in that regard. Based on the evidence on record, and an absence of the evidence from the respondent to disprove the same, it is with no doubt that both the e-mail addresses are from the domain of the companies of parties which is enough to hold that the correspondence was between the appellant and the respondent.

I agree with the appellant cited cases of **Mexon's Investment Ltd vs DTRC Trading Company Limited** Civil Appeal No. 91 of 2019 and the case of **British American Tobacco Kenya Ltd vs Mohans Oysterbay Drinks Ltd** Civil Appeal No. 209 of 2019 that are relevant to our issue at hand. I proceed to hold that based on the principle that in

civil cases the proof is on the balance of probabilities and any party that wanted the court to rule in its favour must give evidence as to the existence of such facts. The law is clear under section 110 (1) of the Evidence Act, Cap. 6 [R.E 2019] that: -

> *"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."*

I am settled that the appellant discharged his legal duty before the trial court submitting as to the existence of the contractual relationship between the parties and managed to exhibit the court with exhibits P1, P2, P3, P4, P5 and P6 to prove that his assertion existed. The same duty was never discharged by the respondent for apart from the written statement of defence he filed, he did not show appearance in person or his attorney to disprove that the facts established by the appellant did not exist. It is from this point I proceed to hold that, the appellant managed to establish that there was a contractual relationship between parties and the correspondences filed as exhibits the same was from the parties.

Based on the circumstances of this appeal, my examination to the evidence in regard to the conduct of the parties and with the aid of the holding in the case of **Engen Petroleum (T) Limited vs Tanganyika Investment Oil and Transport Limited,** Civil Appeal No. 103 of 2003

(unreported), which is relevant to this appeal, the Court had on opportunity to discuss oral agreements and observed that conduct of the parties and the circumstances of the case established that there was an oral contract. In our case at hand the email correspondence suggests that the parties are not stranger to each other, they have business relationship as the proposal and acceptance takes the form of conducts by the parties. This is typical an implied contract which is legally binding and it has the same legal forces like an express or written contract as the obligations derives from the action and conduct of the parties. In this regard I am settled that the first and fifth ground of appeal has merit and I proceed to allow them.

On the 2nd ground of appeal, it was the appellant learned counsel claim that the trial magistrate erred in law by not considering appellant's EFD receipts, delivery notes and invoices that were admitted as exhibit P3 taking into account that there is no evidence on record to show if the issued invoices were paid by the respondent. Going to details of the exhibits, parties have a sale agreement where the appellant supplied fuel to the respondent in consideration of payment. Based on the evidence adduced by the appellant at a trial court and the exhibits tendered, it is my finding that a contract of sale of goods existed between the parties.

The law is clear under the provisions of section 3 (1) of the Sale of Goods Act, Cap. 214 RE: 2002 (now 2019) that: -

> *"3 (1) 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 one part-owner and another."*

It does not dwell there; the law clarifies further that the same can be in any form of a contract and an agreement of sale doesn't need to be in a written form. This is also stated in section 5(1) of the Sale of Goods Act, Cap. 214 R. E. 2002 (now 2019), which states that: -

> *"5 (1) Subject to the provisions of this Act and or 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 of mouth or may be implied from the conduct of the parties."*

Going to the appellant claims, particularly on exhibit P3 which was tendered, the same is self-explanatory that parties had a business arrangement as from 02.12.2017 to 17.09.2018 and the outstanding amount is stated at page 2 of exhibit P4 that by 17.09.2018 the outstanding unpaid amount from the respondent stands at Tsh. 53,140,000.00/= which the respondent via email promised to settle the

payments which according to the appellant, the payments could not be settled. I agree with the appellant's learned counsel that the trial magistrate on his judgment though formed an opinion that the exhibits tendered could not establish a contractual relationship, he did not give reasons for the same.

The Law of Contract act Cap345 RE: 2019, under section 70 clearly states thus: -

> *"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. Provided that, no compensation shall be made in any case in which the person sought to be charged had no opportunity of accepting or rejecting the benefit"*

The law is reflected in the decision I find to be persuasive, that is, **Combe vs Combe** [1951] 1 All E.R. 767, Denning, L.J (as he then was) which has been referred with authority in the case of **Catherine Merema vs Wathaigo Chacha** Civil Appeal No. 319 of 2017 at page 14 that: -

> *"The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the*

other party has taken at him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself had so introduced, even though it is not supported in point of law by any consideration, but only his word'.

I revert to the appeal at hand and to the records especially exhibit P3 in particular and I am settled that the appellant managed to establish that he supplied the respondent with the fuel and tendered exhibits which include the delivery note, tax invoice and the demand note and to their correspondences by the way of email, the respondent pleaded to be indebted by the appellant and severally, prays for extension of time to sort out and pay the appellant.

What I could not find in the trial records is that the appellant's statement of settlement of the amount due to the appellant taking into consideration that the trial court relied on the reply to the demand notice and rule out that the appellant's claim against the respondent could not be established. I agree with the appellant's learned counsel that the trial court erred for the reason that, the respondent did not enter defence to rebut the assertions of the appellant who managed to establish his claim

and exhibited the same with exhibits which give the benefit of doubts to the appellant. In fine, this ground has merit and I proceed to allow it.

On the 3rd ground of appeal, the appellant learned counsel claimed that, Exhibit P6, a demand letter, was wrongly relied on by the trial court to deny the appellant's claims as against the respondent. He insisted that the demand latter was not part of the evidence rather a correspondence between the appellant and the respondent and the denial by the respondent in the demand letter was not a justification for the court to form its decision that the appellant's claim was not valid. The claim was denied by the respondent learned counsel that the trial court was justified to rely on the reply to the demand notice as it was evidence before the court. I had time to read in lines the judgment of the trial court, and as I hinted above, it is with no doubt that the respondent did not give evidence at a trial court for the matter proceeded ex parte against the respondent. What is traced is the WSD which had a general denial of the allegation which in a matter of facts, the respondent needed to counter the evidence given by the appellant for the court to measure the weight of the evidence in the balance of probabilities, for it to be positioned to give its judgment. Short of that, it obviously becomes clear that the trial court was not justified to form its ruling based on the unsubstantiated evidence of the

reply to the demand notice as against the evidence paraded before the trial court. in this regard, therefore, I proceed to find that this ground has merit.

Going on the 4th ground of appeal, it is the appellant's counsel submissions that the trial court erred as respondent's admission was in Exhibit P4 and not in Exhibit P1 and P2. I will shortly address this ground as much has been analysed above that, the trial magistrate did not properly analyse the exhibits tendered to establish the contractual relationship between parties. Moreover, as submitted by the appellant's counsel it was wrong for the trial magistrate to only rely only on the letter replying demand notice which was not substantiated evidence, while there was correspondence that the respondent admitted that there was a delayed payment in respect of payment terms as it is shown on Exhibit P4. Therefore, it is my considered view that the respondent admitted to have delayed payment in email admitted as Exhibit P4. Thus, this ground is also allowed.

In the final analysis, I allow the appeal to its entirety, I proceed to set aside the judgement and the decree of the trial court and ordered the respondent to pay in full the claimed amount as pleaded in the plaint as follows:

(i) The respondent, should pay the claimed amount which is Tsh. 53,140,000/= being the outstanding amount of fuel supplied to him.

(ii) The respondent, should pay USD 5,097.60 being an outstanding balance of the agreed costs for hiring a motor vehicle.

(iii) The respondent should pay the appellant, interest on the decretal sum at the court rate of 2% from the date of this judgement till the date of payment in full.

(iv) Costs of the suits be paid by the respondent.

It is so ordered.

Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
25/03/2022

Court: Judgement delivered in this day of 25th March, 2022 in the presence of the parties' counsels.

M.MNYUKWA
JUDGE
25/03/2022