IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODMA
DC CIVIL APPEAL NO. 23 OF 2022
(From the District Court of Iramba in Civil Case No. 2 of 2020)

SALUM VIALE KIBWANA ..... APPELLANT

VERSUS

SHABAN BESA .....1ST RESPONDENT
PHILIPINA MCHOMVU.....2ND RESPONDENT

JUDGMENT

Last Order: 03rd August, 2023
Judgment: 25th August, 2023

MASABO, J.:-

In this first appeal, the appellant is challenging the decision of Iramba district court (the trial court) which found him in breach of a contract and ordered him to pay a sum of Tshs. 71,400,000/=. It was alleged that the parties had a contract in which the appellant undertook to supply 1200 buckets of sunflower oil at a consideration of Tshs 51,000,000/=. In performance of their part of the deal, the respondent paid the appellant the consideration price of Tshs 51,000,000 in 2017 but he failed to deliver the consignment agreed. Later on in 2018, he promised the respondents that he will repay them Tshs. 71,400,000/= instead of 51,000,000/= but still he failed. As of 2020, he had not paid the money hence the Civil Case No. 02 of 2020 at Iramba District Court the judgment and decree of which is the subject of this appeal. In his memorandum of appeal, the appellant has fronted the following four grounds of appeal.

1. That, the trial court erred in law and fact by failure to analyse and assess properly the evidence adduced consequently, arrived into unjust decision.
2. That, the trial court erred in law and fact by misleading itself when it failed to make a correct interpretation of the law governing and/or regulating stamp duty in relation to the document titled "HATI YA MAKUBALIANO" tendered by the first respondent and marked as Exhibit ex-P 1 hence reached into a wrongful conclusion.
3. That, the trial court erred in law and facts when it relied upon the document titled "HATI YA MAKUBALIANO NO.2" tendered by the first respondent and marked as exhibit EX-P2 which was obtained without free consent from the appellant.
4. That, the trial court erred in law and facts by awarding the respondents which was not proved to the required standards.

On 28th June 2023 the case was scheduled for hearing. Mr. Komba, learned counsel appeared for the appellant whilst Mr. Ndimbo represented the respondents. The matter was ordered to be disposed of by way of written submissions. Both parties filed their submissions before the court as required.

Submitting in support of the appeal, Mr. Komba consolidated the first and fourth grounds and argued that the respondents did not prove that they gave Tsh. 51,000,000/= to the appellant nor did they prove that the said

sum made a profit of 71,000,000/=. They did not tender a written contract nor called any witness who was present at the time the said money was handed over to the appellant. He also disputed the evidence given by PW2 and PW3. It was his submission that, the evidence adduced by these witnesses was contradictory. Also, exhibit P-2 does not bear the appellant's name or his signature to show that he was really involved. Concluding on this point he argued that the burden of proof lied on the plaintiff. In fortification, he referred the court to the case of **Hemedi Said vs. Mohamed Mbilu** [1984] TLR 15 where it was held that the one who alleges the existence of a certain fact bears the duty to prove it. Thus, since the respondent herein did not dispute such duty, the suit ought to fail.

On the second ground of appeal, it was submitted that, admission of exhibits P1 and P2 contravened the provision of section 5 and 47 (1) of the Stamp Duties Act Cap. 189 R.E 2019. In clarification, it was contended that these two documents are among documents that need be stamped before their admission in court but they were not stamped. He bolstered his submission with the case of **Malmo Montagekonsult AB Tanzania Branch vs. Margaret Gama**, Civil Appeal No. 38 of 2001 CAT at Dar es salaam (unreported).

Submitting on the third ground of appeal, he argued that exhibit P2 ought not to have been admitted as it was prepared without the consent of the appellant. Thus, its procurement offended the provision of section 13, 14, 15, and 16 of the Law of Contract Act, Cap. 345 R.E 2019. Supporting his

argument he cited the case of **Humphrey Palangyo and Another vs. Haruna Idd Mwiru,** DC Civil Appeal No. 3 of 2020. It was his further submission that, the appellant was not also afforded the opportunity to read the content of the agreement which was prepared by PW3 who is the police officer in charge of the police station. He was forced to sign it while still under custody and threatened to be detained further if he did not sign it. In conclusion he prayed the court to allow the appeal with costs.

Replying to the consolidated first and fourth ground of appeal, Mr. Ndimbo argued that the trial court did not anyhow err as it correctly analyzed the evidence adduced by the parties. He amplified that the evidence adduced by PW1, PW2, PW3 considered together with exhibits P1 and P2 proved the existence of a business agreement between the parties and that the appellant owed the respondents a sum of Tshs. 71,400,000/=. It was argued further that the admission of these exhibits was not objected which shows they were correct. Moreover, it was argued that as per section 110, each party to the suit is legally bound to prove his case on balance of probabilities and in the end, the court will consider the evidence which has more weight than the other. In support of this argument, he cited the case of **Hemedi Said vs. Mohamedi Mbilu** [1984] T.L.R 15. In conclusion, he reasoned that in the present case, the court found the respondents to have proved their case on the balance of probabilities and on such ground, it decided in favor of the respondents as their evidence was heavier than the appellant's. On the second ground of appeal, he conceded that there are some documents which as per the law, can only be admitted as evidence upon

satisfying a legal requirement such as payment of stamp duty and the that the two documents contested are amongst them. However, he argued that, it is not proper for the appellant to challenge the admissibility of exhibit at this stage as he ought to have challenged them during trial but he did not. In fortification, he referred the court to the case of **Makubi Dogani vs. Ngodongo Maganga** Civil Appeal No. 78 of 2019 [2020] TZCA 1741 (Tanzlii). He argued further that, he is aware that the issue of stamp duty was raised by appellant's advocate in final submission which was similarly wrong and contrary to the law. On this he cited the case of **TUICO at Mbeya Cement Company Ltd vs. Mbeya Cement Company Ltd and Another** [2005] TLR 41 where it was held that submission is a summary of arguments, it is not evidence and cannot be used to introduce evidence.

He proceeded to argue that, had this issue been raised during trial, the trial court could have ordered the same to be stamped as per the case of **M/S Sakoe N. Mwalo Co. Ltd vs. M/S Lukumburu Investment Co. Ltd Civil** Appeal No. 148 of 2019 [2023] TZCH 17571 (Tanzlii). In the alternative, he submitted that nonpayment of stamp duty does not affect the case and cannot, therefore, be a ground to vary the decision of the trial court as held in **First National Bank (T) LTD vs. Yohane Ibrahim Kaduma and Mariane Kusaga Kaduma** Commercial Case No. 128 of 201 TZHCComD 2064 (TANZLII).

Submitting on the third ground of appeal, he argued that the appellant executed exhibit P2 freely as the same was made a day after being bailed.

The argument that he was threatened and was in police custody is without merit. This fact, he argued, is apparent on record as both, PW1 and the appellant himself, testified on this issue. On the complaint that PW3 prepared exhibit P2, he submitted that PW3 did not prepare it in the capacity of a police officer. He prepared it as a member of PW2's family and he did so at PW2's home not at police station.

Having gone through the records, the petition of appeal and the submissions of both parties, I will now proceed to determine the appeal starting with the consolidated first and fourth ground of appeal. In this ground of appeal, the appellant's counsel has passionately argued that trial court misdirected itself in holding that there was a contract between the parties as no proof of such contract was rendered and no document was produced to show that the appellant received the money from the respondents as alleged. The core question to be determined, therefore, is whether there was proof of the existence of a contract between the appellant and the respondents, and if so, whether the appellant breached the agreement. Before tackling these two questions, I find it relevant at this stage to outline the principles which will guide me in determining the consolidated grounds and the entire appeal.

The first regards the role of this court as the first appellate court. It is a settled principle of law that, a first appeal is tantamount to a rehearing of the suit and the first appellate court is duty bound to re-asses the evidence on record to make its independent finding on whether, based on the

evidence on record, the case was proved. Restating this principle in Makubi **Dogani vs Ngodongo Maganga** (supra), the Court of Appeal held that;-

> We wish to note that this being the first appellate court it is entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, arrive at its own decision.

The second concern the burden of proof. The law of evidence places the burden of proof upon the person who alleges existence of a certain fact and wants the court to decide in his favour (see section 110 (1) and (2) of the Evidence Act [Cap.6 R.E. 2019]. A plenty of authorities have expounded this principle. They include the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha**, Civil Appeal 45 of 2017 (unreported) where the Court of Appeal held thus: -

> 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.

Thus, in the present case, since the respondents were the ones alleging that there was a contract between them and the appellant breached the said contract, they were obligated to produce proof to substantiate their claims and the standard of such proof, had to be on the balance of probabilities, which as per the authority above simply meant that their evidence on such claims ought to have been more probable than the appellant's evidence.

After the re-assessment of the evidence, this court will be in a position to answer whether or not the trial court was justified in its findings that the respondents discharged their duty to the required standards.

Sequel to these two principles, this appeal having emanated from an oral contract, it is crucial at this stage to revisit the law of contract and ascertain the status accorded to oral contracts such as the one at the centre of this appeal. The law of contract prevailing in our jurisdiction, recognizes oral agreement and accords them a status similar to written contracts. An oral contract is, therefore, as valid and enforceable as a written contract provided that it constitutes the essential ingredients of a valid contract meaning that it must have been made out of free consent of the parties; the parties making it have the capacity to contract; it is for a lawful consideration and with the lawful object. Section 10 of the Law of Contract Act Cap. 345 R.E 2019, categorically state that:

> 10. All agreements are contract 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 inforce, and not hereby expressly repealed or disapplied, by which any contract is required to be made in writing or in electronic form or in the presence of witnesses, or in any law relating to registration of document.

Proving the terms of an oral contract such as the one asserted by the respondents, is a pure question of facts and contrary to the appellant

counsel's view, it does not necessarirly require any writing . Most often, it is established by oral testimonies of the parties and the person who were present during the formation of agreement. Proof of oral agreement may also be inferred from the conduct of the parties' prior and after the formation of the agreement.

In the present case, the respondents alleged to have entered into an oral agreement with the appellant for supply of sunflower oil, claims which were disputed by the appellant. In proof of their claim, the first respondent testifying as PW1 stated that he was doing business with the appellant who is the uncle of his wife since 2013. In 2013 he gave him a sum of Tshs 8,000,000/= being the money for 200 containers of sunflower oil which the appellant delivered dutifully. In 2014 he gave the appellant a sum of Tsh. 16,000,000/= in consideration of 400 containers, in 2015 he paid him Tshs 25,200,000/= and in 2016 he paid him Tshs 32,000,000/= in consideration of 800 containers. In all these three transactions, the appellant performed his part of the deal by delivering the agreed consignment.

In the following year, 2017, he gave the appellant a sum of Tshs 51,000,000/= in consideration of a consignment of 1200 containers which the appellant had to deliver as per their past transactions but he did not. Instead of delivering the consignment, he gave an excuse that he could not deliver the consignments to them as he has secured a more profitable buyer and promised to repay them a sum of Tshs. 71,400,000/= on February 2018. On this date, the appellant did not repay the money as he claimed that he

had not received any money from the profitable buyer and he requested for addition of six months within which to repay the money due to the respondents but still he failed. On 8th June 2020 they had a meeting where he committed himself in writing through Exhibit P1 to repay the money in October 2020. As he did not repay the money, the respondents took the matter to a police station and had him detained and upon his release on bail, he made another written commitment for repayment (Exhibit P2) which he once again never fulfilled hence the suit. This evidence was supported by the testimony of PW2 and PW3. The appellant, testifying as DW1 totally denied to have any business transactions with the respondents and he asserted that, he was coerced to sign exhibit P1 and P2 whose contents were unknown to him. The trial court found this evidence less probable compared to the respondent's, a finding he is now challenging. Before I move further on the consolidated ground of appeal, since the trial court's finding was based on the oral testimonies of PW1, PW2, and PW3 plus the contents of exhibit P1 and P2 whose admissibility and credibility are challenged in the 2nd and 3rd grounds of appeal, I shall pause here and revert to the consolidated grounds after I have resolved the first and the second grounds of appeal.

On the second ground of appeal, the appellant has challenged the admissibility of exhibit P1 and P2 as they offend the Stamp Duty Act. Indeed, and as per the concurrent view of both counsels, section 47(1) and 5(1) of the Stamp Duty Act Cap. 189 R.E 2019 sets a requirement for certain

instruments not to be admitted in court unless the payment of stamp duty in respect of such documents has been effected. Section 5(1) provides that;

> Every instrument specified in the schedule to the Act and which is executed in Tanzania shall be charged with duty of the amount specified or calculated in the manner specified in the schedule in relation to such instrument.

And, section 47(1) provides thus:

> No instrument chargeable with stamp duty shall be admitted in evidence for any purpose by any person having by law or consent of parties to receive the evidence or shall be acted upon, registered in evidence authenticated by any such flyperson or by any public officer unless such instrument is only stamped.

The immediate issue is whether exhibit P1 and P2 are among the instruments chargeable with stamp duty. Under article 5(ii) of the Stamp Duty Act, the instruments chargeable with stamp duty include acknowledgement of debt exceeding Tshs. 1000/=. Therefore, since exhibit P1 and P2 were in acknowledgment of a debt of Tshs 71,400,000/= which is over and above the minimum amount stipulated under the act, it is obvious that they are chargeable with stamp duty hence fall within the legal requirement above and as per the concurrent view of the learned counsels, they were to be stamped before their admission in court (see the case of **Zakaria Barie Bura vs. Theresis Maria John Mubiru** [1995] TLR 21).

Inversely, both parties agree that they were not and the record shows, as correctly argued by the respondent's counsel, that the appellant did not

object the admission of these two documents hence they we admitted unobjected. He also did not raise this issue in the course of cross examination but belatedly raised the same in his final submission after the closure of the trial which shows that it was an overthought as held in **Makubi Dogani vs. Ngodongo Maganga** (supra), where like in the present case, the appellant belatedly objected the admission of an exhibit. The Court of Appeal held that:

> It is apparent, at pages 72 to 74 of the record of appeal that during the trial, the appellant did not object the admissibility of the said exhibits. It is a settled law that the contents of an exhibits which was admitted without any objection from the appellant, were effectually proved on account of absence of any objection. Therefore, since the appellant did not utilize that opportunity, challenging the said exhibit at this stage is nothing but an afterthought.

Even if the objection was timely and properly raised, that would not have outrightly nullified the document. The law as deciphered from numerous precedents dealing with issue is that, when such an objection is raised, the document will not be outrightly rejected. Rather, upon being satisfied that the instrument is chargeable with stamp duty, the party tendering it would invariably be given an opportunity to rectify the anomaly by paying the required duty and penalty if any. The failure by the party to utilize the opportunity so granted would then render the instrument inadmissible in evidence as stated in **Zakaria Barie Bura** (supra) cited with approval the

case of **Sunderji Nanji Limited vs. Mohamedali Kassam ali Kassam Bhalloo** (1958) 1EA 762, where it was held that:-

> As was held in **Bagahat Ram vs. Rattan Chand**(2)(1930), A.I.R Lah 854), before holding a document in admissible in evidence on the sole ground that it is not being properly stamped the court ought to give an opportunity to a party producing it to pay the stamp duty and penalty. The position in this case is exactly the same. The appellant has never been given the opportunity of paying the requisite stamp duty and prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the second defendant or respondent and he must be given such opportunity.

This position is in tandem with the principle of overriding objective entrenched under section 3A and 3B of the Civil Procedure Code, Cap 33 RE 2019 by which the courts are obligated to dispense substantive justice and not to be unnecessarily embroiled in technicalities. By its nature, the requirement for stamp is a procedural requirement which do not go to the merit of the case as it does not invalidate the content of the respective instrument. Thus, it is just and fair for the respective party to be given an opportunity to rectify the irregularity and make it admissible. It is worthwhile noting that: *one,* such an opportunity may be made available even at an appellate stage such that one at hand as per **Sunderji Nanji Limited** (supra) and, *two,* as held by the Court of Appeal in **Mohamed Abood vs D.F.S Express Lines Ltd**, Civil Appeal No. 282 of 2019 [2023] TZCA 57 TANZLII, failure of the appellant to pay the chargeable stamp duty at the

time the document was admitted in evidence does not constitute a basis for reverse of the trail court judgment or decree. In arriving at this finding, the Court reckoned its previous decision in **Elibariki Mboya vs. Amina Abeid**, Civil Appeal No. 54 of 1996(unreported) where it was held that:-

> The same applies in the present appeal. Rule 115 of the Rules which is parimateria with section 73 of the CPC requires the court to do substantial justice, it should not reverse or vary any decree nor remanded any case on account among others, defect or irregularity in any proceeding in the suit, not affecting the merit of the case or the jurisdiction of the court in that regard, we find that failure of the appellant to pay the chargeable stamp duty at the time of lease agreement was admitted in evidence cannot be a basis for this court to vary or reverse the decision of the High Court.

On the strength of the above authorities, the second ground of appeal cannot sail hence, it fails.

Having resolved the second ground of appeal, the third ground of appeal to which I now turn will not detain me because, just like in the second ground of appeal, the appellant is belatedly challenging the admissibility of the two exhibits which, he claimed, he was coerced to sign without knowing its contents. This too was an after though as he never raised it during the admission of the document and even though he asserted it in the course of testimony as DW1 that he was coerced to sign such document, no proof of such coercion was rendered to convince the court that he was indeed coerced. The undisputed fact that he was once detained at police station for

repayment of the sum subject to this appeal does not suffice as proof of coercion. Needless to emphasize, having fronted the allegation as to coercion, the appellant assumed a duty to provide the court with proof that indeed he was coerced and since the allegation as to coercion are criminal in nature, the proof required was of a standard higher than the normal standard of proof in civil cases. As held by the court in **Ratialal Gordhanbhai Patel v Lalji** (1957) EA 314 when dealing with an issue of fraud raised in a civil case, allegations of criminal nature when raised in civil suit, must be strictly proved. The court amplified that although the standard of proof may not be heavy as the proof beyond reasonable doubt required in criminal law, it should be more than a mere balance of probabilities. As the appellant rendered no such proof, the third ground of appeal cannot similarly sail as it is highly wanting on merit.

Reverting to the consolidated first and fourth grounds of appeal, looking at the evidence on record, I have found out that on the balance of probabilities, the plaintiff through the testimonies of PW1 and PW2 ably proved the existence of an oral agreement between them and the appellant, a fact which was further supported by PW3 and the appellant's commitment to pay as seen in Exhibit P1 and P2.

The law of contract obligates the parties to a contract to perform their respective promises unless such performance is dispensed with or otherwise excused by the law hence the cardinal principle that, parties are bound by their agreements freely entered (see section 37(1) of the Law of Contract

Act). A party who fails to discharge his part of the deal is said to have breached the agreement and becomes liable to the consequences for breach of contract as stated under section 73(1) of the Law of Contract Act, which provides thus: -

> Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

From the evidence on record, it is vividly clear that the appellant acted in breach of the agreement by failing to deliver the consignment agreed upon and by failing to honour his oral and written promise to repay the money, hence he cannot escape the consequences for breach of contract. For this reason, I find no merit in the consolidated first and fourth ground of appeal as the evidence on record sufficiently established not only that there was a contract between the parties but that the appellant acted in breach of the said contract when he failed to discharge his contractual obligation.

In the foregoing, the appeal fails in entirety as all the four grounds of appeal are overruled for want of merit. The judgment and decree of the trail court are hereby upheld and the appeal is dismissed with costs.

DATED at **DODOMA** this 25th day of August, 2023.

J.L. MASABO

JUDGE