IN THE HIGH COURT OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 42 OF 2023

(Arising from the decision of the District Court of Sengerema in Civil Appeal No. 09 of 2023 and from Civil case No. 21 of 2023 at Sengerema Urban Primary Court.)

M/S MASS HUDUMA LIMITED.....APPELLANT

VERSUS

ABEL SIMON.....RESPONDENT

JUDGMENT

5th September & 29th September, 2023

KAMANA, J:

This appeal has been taken at the instance of the appellant, a losing party, in the District Court of Sengerema, the first appellate Court, in which the matter was handled.

The District Court held that the appellant failed to prove his case on balance of the probability as required by the law. Consequently, the appeal was allowed with costs. The appellant being dissatisfied with the decision appealed to this court seeking to reverse the decision. The petition of appeal has four grounds as follows:

1. *That the first appellate Court erred in law for failure to properly construe or for misconceiving the principle of*

balance of probabilities which governs the standard of proof in civil cases.

2. *That the first appellate Court erred in law for failure to properly construe or for misconceiving the types and kinds of agreements vis-a-vis contracts in law.*
3. *That the first appellate Court erred in law for failure to properly consider and evaluate the facts/evidence of the admitted sum of 5 million as a total purchasing price of 260 bags by the respondent.*
4. *That the first appellate Court erred in law for ignoring the contradictions and incredibility revealed by the respondent's witnesses to wit: SU1, SU2, SU3, and C1.*

Hearing of the appeal took the form of written submissions, preferred by the parties in adherence to the schedule. In his submission, Mr. Mutatina, learned advocate for the appellant chose to argue grounds 1, 2 and 3 together while ground 4 was argued separately.

He began his contention by stating that Section 3 (2) (b) of the Evidence Act, Cap. 6 [RE.2019], provides for a standard of proof in civil actions which lays the foundation of assessing the evidence based on preponderance of probabilities. He argued that there was a business

relationship between the parties as can be seen on pages 21, 22, 24, 25, and 30 of the proceedings of the trial Court. He argued further that page 8 of the first appellate court's decision embraces the same fact in which CI testified that the respondent who was the appellant at the District Court bought 260 bags of cement from the appellant. On that basis, he contended the first appellate Court erred in deciding that there was no business agreement between the parties.

He went on to argue that the conduct of the parties and chain of events as testified by the respondent and his witness SU2 and CI show that there was an implied contract/agreement between parties and the subject matter being bags of cement.

The appellant further argued by reciting pages 26 and 30 of the trial proceedings to point out the contradictory evidence adduced by SU2 and C1 as to who was present at the time of counting the bags of cement. With regard to the contradiction, the learned counsel contended that SU2 testified to be alone when he counted the bags whilst C1 testified to be with SU2 in counting the bags.

Mr. Mutatina submitted that the respondent failed to show evidence that he had paid Tshs.5,000,000/-to the appellant. To support his argument, the learned counsel cited the case of **Emmanuel**

Saguda and another v. Republic, Criminal Appeal No. 422 "B" of 2023.

On the 4th ground, he submitted that the evidence of the respondent's witnesses at the trial Court contradicted each other which renders it to be unreliable and incredible. He averred further on this ground that SU2 on page 25 of the proceedings stated that at the time he brought cash to SU1, Godliva was not around, but C1 (Godliva) stated that she was present when Joshua (SU2) brought cash to SU1. He went on to state that on page 26, SU2 stated to have been alone when counting the cement but C1 stated that he participated in counting the same. He says that on page 22 of the proceedings, SU2 testified that he left money to Godliva (C1) but on page 31 the said evidence is contradicted. Lastly, he prayed the Court to allow his appeal and set aside the decision of the District Court of Sengerema.

In his rebuttal submission counsel for the respondent, began his submission by saying that, the testimony of the witnesses SU1, SU2, and CW1 was direct and heavy to the extent that they were all eyewitnesses and they were present at the time when the appellant received 260 bags of cement and that SU2 was also present when SU1 was paying money to SM3.

The respondent further argued that the burden to prove lies on the part of the appellant as to whether there was the existence of an agreement and further that the appellant's key witness SM3 was the one who was looking for the customers and entered into an agreement with them. He argued that SM3 failed to provide a contract, delivery note, invoice, and receipts to the Court to prove the same.

In respect of the fourth ground of appeal, he contended that the evidence adduced by the appellant's witnesses SM2 and SM3 are contradictory and their evidence is fabricated lies and the appellant's witness SM1 adduced testimony based on hearsay as he was not present and was informed through the phone. He supported his argument by citing the provisions of Rule 10 (1)(a) Rule 10 (2) and Rule 6 of the Primary Court (Evidence) Regulations of 1964 and the decisions in the cases of **Barelia Karangirangi v. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 CAT (unreported), **Shehuba Benjuda v. Republic,** Criminal Appeal No. 96 of 1989, **Republic v. Magina Luhanga,** Criminal Case No.71 of 2016 and the case of **Francis Eliud Mnyamwezi v. Republic,** Criminal Appeal No. 82/2021.

In his rejoinder, counsel for the appellant started his arguments by stating that the respondent had joined hands with his argument in his

submission that CW1, SU1 and SU2 were all present during the delivery of 260 bags of cement and that the appellant distinguished the provisions of Rule 10 (1)(a) of the Primary Court(Evidence) Regulation of 1964 to the extent that all the eye witnesses mentioned by the respondent in his submission never had any direct and tangible testimony than contradictions, fabrications and that SU3 despite being the M-PESA agent he does not remember when the money was deposited in his till number nor M-PESA log book to prove that there was transaction happened.

After careful consideration of the entire record and the rival submissions made by both parties, the question is whether the appellant gave 620 bags of cement to the respondent.

In disposing of this matter, I shall discuss the first, second, and third grounds together as argued by both counsels and the fourth ground will be dealt with separately. I begin with what was pleaded by the appellant as reflected in the (form No. 2) a purported statement of claim or plaint.

> *'Namdai mdaiwa Tshs 20,000,000/= deni la mauzo ya cement mifuko 620 aina ya Huaxin. Mnamo tarehe 23/9/2022 kampuni ya m/s mass huduma ltd*

ilisambaza cement kwa mdaiwa mifuko 620 kwenye duka lake la biashara lilipo Nyehunge. Cement aina ya Huxin yenye thamani ya tshs. 13,330,000/= na baada ya kukabidhiwa cement hizo mdaiwa alishindwa kulipa pesa tshs. 13,330,000/= na kusababisha hasara na usumbufu wa tshs. 6,670,000/=.'

It is a cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. This position is fortified by the provisions of Sections 110 and 111 of the Law of Evidence Act, Cap. 6 RE: 2019] which among other things state:

'110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side.'

See also the decision in the case of **Attorney General and 2 Others v. Eligi Edward Massawe and Others**, Civil Appeal No. 86 of 2002 (unreported) and **Berelia Karangirangi v. Asteria**

Nyalwambwa, Civil Appeal No. 237 of 2017 which was referred to by the District Court.

It is likewise common knowledge that in civil proceedings, the party with the legal burden also bears the evidential burden, and the standard in each case is on a balance of probabilities as rightly stated by both parties. The Court of appeal in addressing a similar scenario on who bears the evidential burden in civil cases, in the decision of **Anthony M. Masanga v. Penina (Mama Ngesi) and another,** Civil Appeal No. 118 of 2014 (unreported), quoted with approval the case of In Re B [2008] UKHL 35, in which Lord Hoffman in defining the term balance of probabilities stated as follows:

> *'If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the 10 - party who bears the burden of proof fails to discharge it, a value of 0 is*

returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact is treated as having happened.'

In the instant matter, since the appellant is the one who alleged that he supplied 620 bags of cement to the respondent, the burden of proof was on the appellant. The question which follows is whether he successfully discharged his duty to the required standard.

The evidence as adduced by William Lugadila (SM3) at the trial is to the effect that he received a phone call from a person who introduced himself as a businessman. The witness testified that the caller wanted to buy cement from their enterprise. When he went to the caller's shop he was received by that person. When asked during the cross-examination if that person (the caller) was in court, SM3 did not mince words as he directly testified that the said person was not in court. It is on record that the said person was not called to prove or disapprove the assertion.

When asked whether he had proof that he supplied 620 bags of cement to the respondent, SM3 was categorical that he had no proof. In those circumstances, the first appellate court was right in holding that there was no agreement between the parties. Had SM3 tendered a delivery note signed by the respondent or his agent that he had received

620 bags, the conclusion would be different as the delivery note would serve as proof of delivery of 620 bags. Strangely, the appellant and his agent misconceived the role of the delivery note by testifying that the same is issued after receiving payment. The delivery note has never been proof of payment but proof of receiving goods.

Moreover, I must say that the appellant has failed to discharge his duty, throughout his submissions he has been imposing the responsibility on the respondent something which is not right. The law puts the burden of proof on the shoulders of a person who alleges. In this matter is the appellant. That being the position, the three grounds fail.

Regarding the fourth ground of appeal, through which the appellant faults the decision of the first appellate Court that it ignored the contradictions and incredibility of the witnesses of the respondent. This ground should not detain me. The law is clear as I have cited above. It is to the effect that whoever alleges must prove. The Court can not ground conviction or grant prayers based on the weaker evidence of the respondent. The fourth ground fails.

Given the aforesaid, I hold that the appellant ought to have proved that there was an agreement between him and the respondent and that

he supplied 620 bags of cement in dispute to the respondent. Unfortunately, the evidence on record does not lead this Court to believe so and as such, I do not find any persuasive reasons to fault the first appellate court that ruled that the appellant had failed to prove that there was an agreement between him and the respondent. Consequently, this appeal is hereby dismissed in its entirety with costs.

It is so ordered.

DATED at **MWANZA** this 29th day of September, 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY

KS KAMANA

JUDGE