

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO 17 OF 2011

HANA CO LIMITEDPLAINTIFF

VERSUS

TRANS TRADING & SHIPPING CO. LIMITED.....DEFENDANT

JUDGMENT

BUKUKU, J.

The plaintiff is a Company incorporated in Japan and is involved in providing commercial undertakings internationally. The defendant is a limited liability Company incorporated under the Companies Act Cap 212 of the Laws of Tanzania. The claim against the defendant is for a sum of United States Dollars thirty three thousand (USD 33,000) being an outstanding contractual debt arising out of a contract executed between plaintiff and the defendant for the purchase of copper blisters in Tanzania. The amount paid to the defendant comprise of a commitment fee of 30 per cent of the contract value.

Now the plaintiff is before this court praying for judgment and decree against the defendant as follows;

- a) Refund of USD 33000 as commitment fees and 30 per cent of contract;
- b) Interest at 20 per cent per annum from 1st June 2010 to date of judgment;
- c) General damages as shall be assisted by the court;
- d) Interest on the decretal amount at the rate of 12% per annum from the date the judgment to date of repayment; and
- e) Any other or further reliefs this court deems fit and appropriate

When the matter came for the first time before this court, the plaintiff was under the legal representation of Mr. Manyangu Advocate, and the defendant was represented by one Mr. Said Saleh. On 27.4.2011 when the matter came for mention the defendant was represented by one Mr. Gervas, a legal officer and the plaintiff was still under the same services of Mr. Manyangu, Advocate since the defendant was served but was yet to file his written statement of defence, Mr. Gervas prayed for extension of time to file the same within one week. The prayer was granted by the court. Surprisingly, on 26.5.2011 when the matter was fixed for first pre trial conference, the defendant still had not filed his written statement of defence and no reasons were advanced for the failure to do so. Under those circumstances, plaintiff's counsel prayed for this court to enter

default judgment or else the matter be determined ex-parte. The plaintiff was allowed to prove his case ex-parte.

In support of his claim, the plaintiff called one witness (PW1), Mr. Kim Seong Gil the Managing Director of Hana Co.LT and he tendered one documentary Exhibit (Exh. P1).

Having gone through the plaint and the evidence adduced, I find it pertinent that my judgment will be guided by the following issues:

1. Whether there was a contract between the plaintiff and defendant;
2. If the first issue above is answered in the affirmative, whether the defendant is indebted to the plaintiff; and
3. To what reliefs is the plaintiff entitled to.

Facts which stands out uncontested and which forms the background of this case is as follows:

On 14th April 2010 the plaintiff and the defendant entered into a sale and purchase agreement for the purchase forty (40) metric tons of copper blisters in Tanzania which were to be transported CIF to Pusan Korea and Kobe Japan respectively. The purchase price of the copper blisters was agreed to be United States Dollars Four Thousand Five Hundred per metric ton (USD 4500). In compliance with the agreement, the plaintiff paid in advance, United States Dollars six thousand (USD 6000) as commitment fee and on 26th April and 11th May 2010, the plaintiff further paid twenty

seven thousand United States Dollars 27,000 as thirty percent of the value of the contract. Further facts also are that, the defendant would deliver twenty metric tons of copper blisters ten days after the plaintiff had paid United States Dollars twenty seven thousand (27000) as 30 per cent of the contract value and this was to be 22nd May 2010. It is further claimed that due to the failure of the defendant to honor the contract, on 23rd June 2010 the plaintiff issued termination notice to the defendant informing him of the damage he suffered due to non delivery of the goods (copper blister). It is alleged that the defendant on his part, responded to the termination letter issued by the plaintiff and promised to refund the contract sum paid to him. However, to the plaintiff's amazement, the defendant has not paid even a single cent even after the demand notice was served to him. What has landed the parties in this court is that, despite payments having been done and verbal follow ups made, the defendant failed to honor what was agreed in the agreement.

The brief testimony of Mr. Kim Seong Gil, Managing Director of Hana Company Limited (PW1) was that, he entered into a contract of sale and purchase with the defendant company through Mr. Becker. His company was to purchase copper blisters from the defendant. The agreed contract price was USD 4,500 per metric ton and that, as agreed in the contract, he together with one, Mrs. Kigalu paid cash USD. 6,000 at the defendant's office and the second payment amounting to 27,000 USD, was paid to the defendant's account. In total, the amount paid was USD. 33,000.00. Having paid the agreed amount he waited to be provided with the Bill of

Lading to show proof that the goods have been transported as agreed. Unfortunately he was not issued with the same. PW1 tendered in court the original sale and purchase contract which was admitted in evidence as Exhibit P1. He further testified that upon failure of defendant giving him the Bill of Lading, he wrote a letter to the defendant requesting to terminate the contract and be given back the monies paid. In response, the defendant agreed to refund him his monies, but to no avail. Concluding, he prayed this court to enter judgment in his favour, grant him costs of the suit plus costs of air ticket.

Briefly that was in substance, the evidence which was tendered during the trial and which I have to base my finding. From the onset it must be borne in mind that although the plaintiff has been allowed to prove his claim ex parte, this court has a duty of seeing that the standard required has been reached. This Court is left with no option other than going through the evidence tendered by the plaintiff. It is the plaintiff who filed the suit alleging indebtedness by the defendant. The court has a duty to see to it that the plaintiff proves his case on the balance of probabilities as it is in all civil cases, before the court can grant him judgment, as observed in the case of **Peter Nghomango v Gerson M.K Mwanga and The Attorney General, CAT, Civil Appeal No 10 of 1998.**

The first issue is whether there was a contract of sale and purchase of copper blisters between the plaintiff and the defendant. In the pleading

the plaintiff's claim bases on the following paragraphs 2 to 6 which tells it all:-

- "2. *That on 14th April 2010 the plaintiff and the defendant entered into sale and purchase agreement to purchase forty metric tons of copper blisters in Tanzania which were to be transported to CIF Pusan Korea Japan respectively.*
3. *That the price of copper blister was agreed to be at the USD four thousand five hundred per metric ton*
4. *That the plaintiff paid in advance United States Dollars six thousand as commitment fee*
5. *That on 26 April and 11 May the plaintiff paid the defendant United States Dollars twenty seven thousand as thirty percent of value of contact*
6. *That it was express term of agreement that the defendant would deliver 20metric tons of copper blister ten days after the plaintiff has paid."*

From the face of the pleadings and the exhibit tendered by PW1 and admitted by the court as Exh.P1, I am satisfied that there was a sale and purchase contract between the plaintiff and the defendant. This is sufficiently established by Exh. P1 which PW1 tendered the original copy of the said contract. Since the defendant did not file his defence or to

challenge the said exhibit in whatever manner, I therefore answer the first issue in the affirmative.

The second issue on line is whether defendant is indebted to the plaintiff. In answering this issue, I will exalt my mind on the evidence tendered. In his testimony, PW1 tendered only one exhibit- the original copy of the sale and purchase contract. No other evidence was tendered to substantiate his claim that indeed he paid the defendant in cash, a total of Six Thousand United States Dollars as advance payment and thereafter, he paid through the bank, the balance of Twenty Seven Thousand United States Dollars as thirty percent of the value of the contract.

Let me pause here and first expose the position of the law regarding the burden of proof. This is provided in section 110-113 of the Evidence Act as follows:

"110- (1) Whoever desires any court to give judgment as to any legal rights 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 facts, it is said that the burden of proof lies on that person.

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

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 any law that the proof of that fact shall lie on any particular person.*

113. *The burden of proving any fact necessary to be provided order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."*

Sarkar on Evidence, 16th Edition pg. 1593 aptly states the nature of the burden of proof as follows:

"The elementary rule in section 101 is inflexible and must apply to all cases. Section 102 makes it clear that the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to relief, the onus shifts on to the defendant to prove those circumstance, if any, which I would disentitle to the plaintiff to the same."

The principle here is, the burden rests upon the party who would fail if on evidence at all or no more evidence, as the case may be, were adduced by either side. In other words, it rest, before any evidence whatever is given, upon the party who has the burden of proof on the pleadings i.e who asserts the affirmative of the issue and it rests, after evidence is given into, upon the party against whom at the time the question arises, judgment would be given if no further evidence was adduced by either side.

Before embarking into the nitty gritty of this case, I should confess that, in my observation, most of the parties and their Advocates, especially in ex parte cases, lose sight of this important legal aspect of burden of proof thus ending up failing to organize properly the prosecution of their respective cases by producing either irrelevant evidence or omitting glaring evidence which from the look of things, is at their disposal. The elementary principle that he who alleges has to prove seems to have evaporated, as I shall demonstrate later on in this judgment.

Now, back to the facts before us. As already mentioned, the only evidence which plaintiff has relied in his case is exhibit P1. There is nothing to show that indeed, plaintiff paid the defendant a total sum of USD. 33,000. This being a huge sum of money, one would expect that plaintiff should have tendered as evidence receipt of payment in whatever form, be it a normal receipt from the defendant, an acknowledgement letter, a bank pay in slip or any other document showing that indeed, the defendant received the said amount. This was not done. Under such circumstances, it is difficult for this court to ascertain the genuineness of plaintiff's claim.

One can simply say that, the plaintiff has put himself into a tight corner by his laxity. He has not bothered to prove anything. Although he claims to have paid the defendant USD 6,000 in cash and USD. 23,000 via bank transfer, he never bothered to tender as evidence receipts or bank pay in slip. It is a fact that, a party who wishes to prove a fact has to shoulder disturbances including ransacking old documents however dirty or

dusty they may be in order to unearth supportive evidence. Here plaintiff was duty bound to establish that he gave defendant the said amount of money. Unfortunately, he has failed to do so. He has closed his case without erecting a balance of probability upon the defendant. Even the Counsel for the plaintiff did not take any step or lead any evidence to substantiate the claim.

Another glaring fact is that, in giving his testimony, the plaintiff alluded that, himself and one Mrs. Kigalu (PW1's witness to the contract) paid the cash amount at Mr. Beckers' office. One would naturally have expected the plaintiff to call the said Mrs. Kigalu to give evidence. In the case of **HEMEDI SAIDI V MOHAMED MBILU (1984), TLR 113(HC)**, the court held that,

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

I would not diverge from the observations in the above referred case because it has not beaten my mind as to why the learned counsel for the plaintiff failed to advise the summoning of this important witness to his client's case knowing for sure her testimony would have formed a series complementing his client's case. The duty to call a witness is not that of the court but is for the party who wants to be believed in his story and win the case. In short, on my evaluation of what PW1 testified and the

evidence tendered, it is obvious to me that, the gaps in the plaintiff's testimonies has left this court with no choice other than to say that the plaintiff has not proved her case to the standard required by law i.e on balance of probabilities as to warrant this court to award the reliefs as claimed in the pleadings. In my opinion, it was important in this case to show that money was paid to the defendant by showing tangible evidence like receipts. The receipts or any other form of acknowledgement from the defendant is the crux of plaintiff's case. By so doing, it could have given hammer to this court to decide otherwise.

For reasons stated herein, I have no option but to answer the second issue in the negative.

Having said so, it falls to fate that the third issue as to what reliefs the party is entitled to, also fails.

The short falls demonstrated above are sufficient to dispose of the case. Under section 112 of the law of Evidence Act- Chapter 6 of the Laws, the burden is on the plaintiff to establish that the defendant has failed to discharge its duties in accordance with the terms of the contract. The plaintiff has failed to prove it. He has failed to establish that the defendant received the said amount of money for the purchase of the copper blisters according to the contract.

With this deficiency, I would hold that the plaintiff failed to prove its case. Consequently, I dismiss it with costs.



A.E BUKUKU

JUDGE

21 NOVEMBER, 2011

Judgment delivered by me this 21st day of November, 2011 before Mr. Mgalula Legal Officer of Mr. Manyangu, Advocate and in the presence of Mr. Peter Toma, Defendant' Director in person.



A.E BUKUKU

JUDGE

21 NOVEMBER, 2011

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