IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL APPEAL NO. 55 OF 2017

ELIAS B. RAMIN & COMPANY LIMITED.....PLAINTIFF

Versus

D. B SHAPRIYA & CO. LIMITED.....DEFENDANT

Last Order: 31st Mar, 2020

Date of Judgment: 21st Apr, 2020

JUDGMENT

FIKIRINI, J.

The plaintiff, is a duly registered company dealing in supply and transportation of cement, whilst the defendant is a registered company whose undertakings in construction includes having a biogas site in Mtwara.

In this suit the plaintiff sued the defendant for the breach of contract and recovery of Tzs. 243,081,500/= for the supply of cement and Tzs. 6,769,000/= for the transportation costs of the cement. It was alleged by the plaintiff that in the year 2013, the two companies entered into an oral contract, the plaintiff's obligation was to supply and transport the cement to the defendant up to the defendant's site

in Mtwara, and the defendant's obligation was to purchase and pay for delivered cement.

The plaintiff alleged that out of this court the defendant defaulted paying Tzs. 243,081,500/= for the supply of cement and Tzs. 6,769,000/= for transportation costs. Following the default the plaintiff prayed from this Court for declaratory orders that the plaintiff is entitled to payment of the outstanding balance, payment for damages amounting to Tzs. 100,000,000/= for losses suffered, interest at 14%, costs of the suit and any other relief deemed fit and just by the Court.

Admitting existence of some sort of an agreement, the defendant nonetheless, blamed the plaintiff for failure to fulfill and discharge her obligations, and hence prayed for the suit to be dismissed with costs.

A number of advocates took part at different stages of this case. As from 18th July, 2018, when the Court framed issues, Mr. Omary Msemo advocated for the plaintiff while Mr. Simon Mrutu featured for the defendant, but later on Mr. Roman Masumbuko continued with the prosecution of the case.

On the material day, when the Court framed the issues, the following issues were framed:

1. Whether the plaintiff failed to fulfill its obligation against the defendant and to what extent, if any;

2. Whether the defendant is liable to pay the plaintiff the sum of Tzs. 243,051,000/= and Tzs. 6, 726,000/=

3. To what reliefs are the parties entitled to.

The plaintiff filed two witness statements, that of Elias B. Ramin filed on 05th June, 2018 and that of Hassan Saudi Masengwa. The defence case had two witnesses DW1- Dipackumar Chandrakant Kotak and DW2- Lewis Saha Mcharo.

A number of documents were tendered and admitted into evidence namely: demand notices dated 22nd March, 2016; 02nd June, 2016; 09th August, 2016 and 12th April, 2017 which were admitted and marked as exhibit P_1, collectively, and a letter dated 04th August, 2016 from the defendant signed by Executive Director one Dipak Kotak admitted and marked as exhibit P_2.

The summary of what transpired in Court for the plaintiff's case based on PW1's evidence, was that, PW1 who was the Managing Director of the plaintiff was approached by DW1 Dipackumar Kotak, who was known to him as an Executive Director of the defendant, sometime in 2013, for the business mission of supplying cement to defendant's site at Mtwara port where the defendant had a construction

undertaking. The plaintiff undertook the assignment and delivered the cement from the manufactured at Twiga Cement factory, located at Wazo Dar es Salaam using the plaintiff's fleet of trucks. A total of 13, 885 bags of cement worth Tzs. 243, 081, 500/= plus transport costs totaling to Tzs. 6,796,000/= had accrued by the end of 2013. The plaintiff demanded payment from the defendant but to no success. This was followed by demand notices as reflected in exhibit P_1 collectively. Adding up to his testimony, PW1 also stated that on 04th August, 2016, DW1, wrote the plaintiff acknowledging the outstanding amount referencing the meeting held on 30th July, 2016, in the defendant's office. The letter was admitted into evidence and marked as exhibit P_2.

With regard to the witness in the name of Hassan Saudi Masengwa, who was absent in Court, Mr. Msemo wanted to tender his witness statement. Mr. Masumbuko, objected the attempt which the Court pursuant to Rule 56 (2) of the High Court (Commercial Division) Procedure Rules, 2012, upheld, for the failure of Hassan Saudi Masengwa to show up for cross-examination and without any satisfactory reasons availed to this Court.

On the other side, DW1 in their defence case while admitting there could have been an understanding to be supplied cement as reflected in paragraph 2 of the amended written statement, but disputed making any orders of supply of cement

from the plaintiff. He also stated that the alleged orders based on our understanding, it could have been either by way of local purchase order (LPO) issued by the defendant indicating type of the goods ordered as well as the price or the plaintiff would have issued an invoice for the ordered goods before supply.

According to DW1 this would have ensured that there was indeed a contract of supply of goods and if that supply of the goods had happened then the records of the supply would have been kept for all other purposes including taxes. Also it was DW's reasoning that if there were deliveries of cement there could have been delivery notes signed by the defendant (buyer) produced to that effect. In concluding his testimony, DW1 declined existence of any round table discussions involving him to discuss any outstanding amount.

DW2- Human Resources personnel testified receiving a call from PW1 making claims but failed to produce documents when requested to substantiate the claims. Apart from that claim from PW1, DW2 refuted the defendant making any orders for supply of cement from the plaintiff or delivery of cement to the defendant from the plaintiff.

From the brief account of each side's case, the Court marked close the plaintiff as well as the defence case, and after that, Counsels requested to file final submissions, the request which was granted by this Court.

Mr. Msemo in his submission addressing the first issue framed as to *"whether the plaintiff failed to fulfill its obligation against the defendant and to what extent, if any,"* contested the defendant's evidence that there was no any contract between the parties. It was the plaintiff's contention that the defendant's refutation was contrary to what was in paragraph 2 and 4 of amended written statement of defence acknowledging existence of some undertaking of cement supply between the parties. The plaintiff based on PW1's testimony argued that even though the agreement was oral, but under the Tanzania law and as per the case of **Merali Hirji & Sons v General Tyre (E.A.) Limited [1983] T. L. R. 175, (cited in support)** that was valid contract.

He contested the submission by the defence that the plaintiff failed to fulfill her obligation as averred in paragraph 3 of the amended written statement, contending that in actual fact the plaintiff supplied the cements as required which was the only obligation she had. This fact was admitted by the defendant in her paragraphs 2 and 4 of the amended written statement of defence. Adding to that the plaintiff underscored the fact that the demand notices-exhibit P_1, which were never disputed during the hearing, clearly explained the nature of the outstanding amounts. Otherwise the defendant, pursuant to section 112 of the Tanzania Evidence Act Cap 6 R.E.2002 (the Evidence Act), was the one with the burden to prove, that

there existed conditions and duties, which the plaintiff has failed to fulfill, submitted Mr. Msemo. In support of his submission he referred this Court to the case of **Paulina Samson Ndawanya v Theresia Thomas Madaha, Civil Appeal, No. 45 of 2017 (unreported)** which was quoted with approval in the case of **Bakari Mhando Swanga v Mzee Mohamed Bakari Shelukindo & 3 Others, Civil Appeal No. 389 of 2019, CAT at Tanga (unreported).** He thus invited the Court to conclude that the plaintiff has proved the first issue in the required standard.

Taking up the second issue as to "*whether the defendant is liable to pay the plaintiff a total of Tzs. 243,081,500/= and Tzs. 6,796,000/=*" Mr. Msemo contended that the plaintiff has been able to prove the outstanding amount the defendant owed the plaintiff, relying on exhibits P_1 and P_2. He particularly relied on exhibit P_2, which had DW1's signature and accepted by both DW1 and DW2. Mr. Msemo raised a number of nagging questions, including the possibility of DW1 signing on a letter binding the company to settle monetary liability without having details as well as the defendant through DW1, authorizing payment of amount which did not exist. Based on the submission he prayed for the Court to hold that the outstanding amounts reflected in exhibit P_1 and the letter dated 09th August, 2016 which referred to the meeting held on 30th July, 2016, and exhibit P_2

a letter signed by DW1, to be taken as admission of the outstanding amount since no counter amount was indicated in the defendant's entire pleading and defence.

The third issue on reliefs, it was Mr. Msemo's take that the plaintiff was entitled to the reliefs as they appear in the amended plaint, citing the case of **The Cooper Motors Corporations Limited v Moshi Arusha Occupational Health Services [1990] T.L.R. 96** on general damages and **Bashiri Ally (*a minor*) *suing by his next friend* Fatuma Zabron v Clemencia Falima & 2 Others [1998] T. L. R. 215,** on the object of an award of damages.

Mr. Masumbuko on the other end was adamant that the plaintiff failed to prove existence of contract of sale be it oral or in writing and/or delivery of cement. No any documentary evidence was produced by the plaintiff that it has ever had a stock of cement for sale, price and that the cement was delivered to the defendant. While the plaintiff failed to prove there was particular order received from the defendant, DW1 and DW2 confirmed that there was no such order made or goods received. Under the circumstances the plaintiff cannot be said to have performed its obligation under the contract, citing section 5 (1) of the Sale of Goods Act, Cap. 214 R.E. 2002 (the Sale of Goods Act). To enhance his submission, he cited the case of **Engen Petroleum (T) Limited v Tanganyika Investment Oil and**

Transport Limited, Civil Appeal No. 103, CAT at Dar es Salaam (unreported).

Extending, his submission Mr. Masumbuko also made reference to section 112 of the Evidence Act, amplifying on its required standard of burden of proof once one alleges a disputing issue, which in the present case was that the plaintiff has failed to prove what she alleged that the defendant ordered cement and the plaintiff supplied, without producing any documentary evidence which includes LPOs, delivery notes and invoices in respect of the orders and deliveries. Dismayed, Mr. Masumbuko wondered how the claim of more than Tzs. 243 million could be without a single invoice or delivery of 13, 885 bags of cement which cannot be delivered in one lot, yet there were no evidence to that effect. Fortifying his submission and comparing section 103 of the **Indian Evidence Act, 1872**, which is *pari materia,* to section 112 of the Evidence Act, where **Sarkar on the Law of Evidence (LexisNexis, 19th Ed) p. 2018**, discussed on who has a duty to prove the whole fact which she alleged, to warrant judgment in her favour. According, to Mr. Masumbuko there was no evidence proving that the plaintiff ever delivered any cement bags, meaning she failed to discharge its burden of proof in that regard.

Further in his submission Mr. Masumbuko submitted that there cannot be sale contract if no price is agreed or fixed. Otherwise the Court cannot impute any price

since price must be agreed by the parties, including transportation costs. With this submission he made reference to section 10 (1) of the Sale of Goods Act, which deals with price in a contract of sale. And in that regard he concluded that there was no evidence put forward by the plaintiff that parties agreed to transportation costs. He as well made reference to section 29 of the Sale of Goods Act, requiring proof of seller to deliver the goods and buyer to accept and pay for them as per the parties' agreement.

All these combined together, he submitted that there was no contract and the plaintiff had no any obligation to perform, thence making the first issue to be answered in affirmative.

Tackling the second issue, it was Mr. Masumbuko's submission there was no compliance to section 3 (1) of the Sale of Goods Act, as there was no evidence led indicating there was passing of good from the plaintiff to the defendant to require the latter to pay for the goods delivered as per section 29 of the Sale of Goods Act. He went on submitting that section 6 (1) of the Sale of Goods Act, prohibit enforcement of any contract whose value was more than Tzs. 200/= unless the buyer accepts the goods or it was in writing. The claim of Tzs. 243 million cannot therefore be fulfilled unless there was adherence to the provision of section 6 (1) of the Act. The defendant was therefore liable to pay the plaintiff the sum claimed.

Addressing the reliefs aspect, it was his submission that since the first and second issues have been answered in favour of the defendant, there was nothing the plaintiff was entitled. Citing section 50 (1) of the Sale of Goods Act, and the case of **Livio Carli v Geom R. Zompicchiati [1961] EA 101,** where the Court ruled out that the seller was entitled to proportionate value of the goods which were not rejected. This was however, not the case in the present matter, submitted Mr. Masumbuko.

On the general damages, it was his submission that since the plaintiff has failed to prove any contract or goods supplied, there was thus no basis claiming for this relief. Likewise, there was no basis to award interest as pleaded in the plaint. On that note, Mr. Masumbuko pleaded for dismissal of the suit with costs.

This being a civil suit, the standard of proof is that of balance of probabilities. This point has been well illustrated in the case of **Wolfgang Dourado v Tito Da Costa, ZNZ, Civil Appeal No. 102, CAT – (unreported)**, where the Court has this to say:

> *"Whoever alleges a fact, unless it is unequivocally admitted by the adverse has to prove it, albeit on the balance of probability"*

The stance was echoed in the case of **Bakari Mhando Swanga v Mzee Mohamedi Bakari Shelukindo & 3 Others, Civil Appeal No. 389 of 2019, CAT-Tanga (unreported)** which quote with approval the decision in **Paulina Samson Ndawanya v Theresia Thomas Madaha, Civil Appeal No. 45 of 2017, CAT (unreported).** The Court had held:

> *"It is equally elementary that since the dispute was in civil case, the standard of proof was on balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on the particular fact to be proved."*

Also under section 3 (2) (b) of the Evidence Act, the law has provided how a civil matter be proved by stating:

> *"A fact is said to be proved when in civil matters, including matrimonial causes and matters, its existence is established by preponderance of probability"*

Adding to above stance are sections 110, 111 and 112 of the Evidence Act, all are related to burden of proof. That the one who alleges must prove. Section 112 of the Act in particular has been relied on by both counsels in advancing their

respective position. The provision provides that the burden of proof as to any particular facts lies on that person who wishes the Court to believe in its existence. See: **Abdul Karim Haji v Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2004 (unreported).**

In line with the above pointed out legal position, the Court will embark on determining this suit based on the three issues framed one after the other.

The first issue on "**Whether the plaintiff failed to fulfil its obligation against the defendant and to what extent, if any**"

According to PW1 sometime in 2013, DW1 approached him and they agreed that the plaintiff will supply and deliver to the defendant cement using the plaintiff's fleet of trucks. Admitting there was conceivably such agreement, the defendant in their amended written statement of defence in particular under paragraphs 2, 3, 4 and 5 made reference to the plaintiff's failure to fulfill its obligation. While it is admitted that oral contracts are valid as per the Tanzania legal system as held in the **Merali Hirji's** case (supra) and provided under section 10 of the Law of Contract, Cap 345 R. E. 2002 (the Law of Contract). Section 10 of the Law of Contract provides as follow:

> "***All agreements are contracts if they are made by 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."*[Empahasis mine]

Reading from the provision, though oral contracts admittedly exist but still certain conditions must be fulfilled. In the present suit terms and conditions governing their agreement was never disclosed neither was the consideration. Notwithstanding the shortcomings, since the parties did not vehemently refute existence of some business understanding, it thus did not stop parties each to carry out their obligation. The only important thing was for the parties and particularly the plaintiff to be able to prove that she had fulfilled her obligations as agreed in the oral agreement. Since the claim was the plaintiff supplied and delivered to the defendant cement, she was therefore expected to show the following: (i) that there was an order from the defendant albeit oral. Ordinarily and on presumption the plaintiff was a business entity, recording of the order would have been done, indicating the date, amount and price. (ii) it was expected for the plaintiff to provide for purchase of the cement receipt since it was evident the cement was to be purchased from Twiga cement factory, but even if the cement was being produced by the plaintiff, still process of ordering and delivering ought to have

been recorded for their own use and of course when raising invoices later, (iii) the cement to be delivered to the defendant using the plaintiff's fleet of trucks must have a recorded information, on how many trucks with their registration numbers transported the cement, amount, date, possibly driver's name and gate pass showing a truck has left the premises or godown with certain amount of cement, destined to the defendant (iv) at the defendant's site, the Court was expecting to be furnished with signed delivery notes, and (v) invoices raised based on the order and delivery notes.

Price of the cement was important component of the agreement as the claimed outstanding amount accrued mainly from the alleged supplied and delivered cement which was not paid for. Section 10 (1) of the Sale of Goods Act, which provides:

> *"The price in a contract of sale may be fixed by the contract or may be left to be fixed in a manner thereby agreed or may be determined by the course of dealing between parties."*

Cemented the necessity of knowing the price agreed on by parties when sealing their agreement. According to the provision price may be determined when the contract is entered or may be left to be fixed as agreed or how the transaction unfolds. In the present suit the Court was not availed with any evidence in that

respect nor was it appraised on how the figures Tzs. 243, 081, 500/- for costs of the cement and Tzs. 6,796, 000/= for transport was arrived at. The mode of payment was equally important to be agreed on, which there was no such evidence led to indicate what was agreed between parties. The agreement, even though was oral, but it did not stop the parties to agree on these basic terms and conditions.

Despite insisting of supplying and delivering to the defendant's site 13, 388 bags of cement, but without proof of the order by the defendant or a copy of the purchase receipt which its original could have been issued to the defendant, or delivery notes acknowledging receiving of the cement by the defendant or invoice notes raised in that regard by the plaintiff, the plaintiff's claim remains unsupported. Exhibit P_1 a collection of demand notices though undisputed but in my considered view cannot be conclusive evidence and basis of the plaintiff's claim. The demand notices could only add and support or corroborate all the other evidence had there been any and not otherwise. Likewise, exhibit P_2, does not disclose any useful information to advance the plaintiff's case.

Exhibit P_2, regardless of being recognized by DW1 and DW2 and the fact that it was signed by DW1, the Executive Director, the letter does not disclose much. As pointed out by Mr. Msemo it was strange for the Executive Director of the Company to sign a letter binding the company to settle monetary liability without

having the details or committing the company to the liability which probably did not even exist. While in agreement with Mr. Msemo on the serious inattention of DW1, yet this Court declines the invitation by Mr. Msemo, urging the Court to hold that the outstanding amount reflected in exhibit P_1 is the same amount admitted by the defendant in exhibit P_2 since there was no any counter figure indicated in their pleading and defence. Exhibit P_2, signed by DW1 though admits liability, but the document does not disclose liability in respect of what and the amount involved. Nowhere in the exhibit P_2, it has been stated that the outstanding amount is for the cement worth Tzs. 243,081,500/=or Tzs. 6,796,000/= claimed for transportation. The letter could be in reference to other business transaction between the parties and the outstanding amount different from the one reflected in exhibit P_1.

Failure to furnish the Court with such important evidence places the plaintiff's claim that there was agreement albeit oral between the parties and/or that the plaintiff performed its obligation while the defendant did not, lacking. As submitted by Mr. Masumbuko, section 5 (1) of the Sale of Goods Act, which could cover the presumed contract of sale between the parties in this suit, by their inferred conduct, still there was no tangible evidence led in that regard by the plaintiff. The case of **Engen Petroleum** (supra), well fits the present situation that

the plaintiff has failed to prove her case even on the balance of probabilities. In the cited case the Court faced with almost the same scenario had this to say:

> *"……..that the appellant did not establish the claim on the balance of probabilities.* ***That is indeed the position because no invoices and delivery notes were produced to prove that petroleum products supplied to the respondent were paid for….*** *" [Emphasis mine]*

Alike in this case no any local purchase order, purchase receipts, delivery notes and invoices were produced in support of the plaintiff's case. In that respect, the plaintiff has failed to discharge her obligation as required under section 112 of the Evidence Act. Since she was the one who want the Court to believe that it had contractual agreement with the defendant and that it had discharged her contractual obligation which was to supply and deliver cement to the defendant. I completely agree to Mr. Masumbuko's submission that 13,885 bags of cement worth Tzs. 243,081,500/= was a huge consignment to be without a single invoice or delivery note for the goods supplied and delivered.

Under section 29 of the Sale of Goods Act, it was the duty of the parties for each to fulfill its obligation in accordance with the terms of the contract. It is unfortunate the Court was never furnished with the exact terms and conditions of the sale of

contract entered between the parties. The little information availed to Court it was that the plaintiff was to supply and deliver cement ordered by the defendant to the defendant's site in Mtwara. This stated, but there was however, no evidence produced to prove that the plaintiff supplied and delivered the ordered cement by the defendant, to the defendant's site.

Therefore, in answering the first issue, the answer is in affirmative that the plaintiff failed to fulfill its obligation against the defendant of supplying and delivering cement.

The second issue on "**Whether the defendant is liable to pay the plaintiff the sum of Tzs. 243,081,500/= and Tzs. 6,796,000/=**"

This issue will not detain this Court much. Since the plaintiff has failed to prove that she fulfilled her obligation of supplying and delivering cement presumed ordered by the defendant, no any claim for payment can arise for a none performed or fulfilled obligation. The elaborate discussion carried out in dealing with the first issue can as well fit here.

This issue is therefore answered in negative that the defendant had no any liability of paying the plaintiff any sum of money as claimed.

The last issue is on reliefs. Since the plaintiff has failed to prove her claim against the defendant that there was cement ordered, supplied and delivered, naturally no claim against the defendant would sustain. In this suit alike, the plaintiff deserves no reliefs, neither is, general damages nor is interest.

In conclusion, this Court finds the plaintiff to have failed to prove her case on the balance of probabilities, the standard required in law and consequently the court is dismissed with costs. It is so ordered.

P. S. FIKIRINI

JUDGE

21st APRIL, 2020