IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CIVIL APPEAL NO. 252 OF 2016

(Originating from the Judgment and Decree of the Kisutu RM's Court at DSM in Civil Case No. 90 of 2016 Dated 8th December, 2016)

GEOFREY MOSI.....APPELLANT

VERSUS

MWANANCHI INSURANCE COMPANY LTD.....RESPONDENT

JUDGMENT

Last order date: 21st June, 2018
Judgment date: 28th June, 2018

MLYAMBINA, J

The afore named appellant being aggrieved by the judgment and decree of the Resident Magistrates Court of Dar es Salaam at Kisutu (Hon. W.R. Mashauri, PRM) delivered on 8th December, 2016 in favour of the respondent hereby appeal against the whole of the judgment and decree to this Hon. Court on the following grounds, namely; -

(a) The learned Principal trial Resident Magistrate erred in law and in fact by making a finding *sua motu* that the defendant had paid the plaintiff the sum of TZs 32, 000,000/= appearing on the discharge of the liability voucher.

(b) The learned Principal trial Resident Magistrate erred in law and fact by rejecting the Plaintiff's claim of TZs 43, 800,000/= in spite of the exhibit tendered in Court in support of the claim.

During hearing, Julius Mancheka advocate who appeared on behalf of the appellant was of the following submission in respect of the first ground of appeal; that, the defendant was served with summons to file Written Statement of Defence (WSD). That, the respondent was served twice with submissions to appear and file WSD. The matter was eventually heard ex-parte.

The appellant's counsel went on to submit that; although the Plaintiff signed the discharge of liability voucher, he testified in Court during hearing that he was to be paid in two weeks after signing the discharged voucher. The appellant's counsel contended that his client went to the respondent's office to collect money after two weeks of signing voucher but he was not paid at all.

Furthermore, the appellant's counsel stated that it is the practice of insurance company to pay 45 days after signing the discharge voucher. It was the view of the appellants counsel that the trial Magistrate erred in law and fact by only relying on the signature of the appellant on the discharge voucher. There was neither Bank Statement nor cheque nor receipt which could be used by the respondent to prove payment.

The appellants' counsel was of strong view that, had the defendant shown appearance in the case, the plaintiff could have avenue to cross examine him on the modality of payment. According to the appellant's counsel, Order VIII rule 14 of the Civil Procedure Code, Cap 33 (R.E.2002) requires the Court to pronounce judgment if the party refused to file WSD.

The appellants told us that, the rationale of Order VIII rule 14 (*supra*) is that the silence of the defendant to file WSD or to appear in Court means failure to defend the claim.

The appellant's counsel maintained that; it was not the duty of the trial Magistrate to make allegation that the plaintiff endeavored to deceive the court only because the discharge voucher was signed by the plaintiff. It is the duty of the Court

as set under Section 95 of the Civil Procedure Code (*supra*) to make sure that the end of justice is meet.

The appellant's counsel maintained that the discharge Voucher Contract was prepared by the respondent in English language which is not understood by this poor appellant. The only thing which the claimant understood is that he was supposed to sign the voucher and receive TZs 32, 000,000/= after two weeks. That is to say, the appellant and the respondent were not in equal terms.

Therefore, in view of the appellant's counsel, the Court should not have relied on the signature alone and conclude that the Plaintiff was paid. The defendant who is in the higher bargain position refused to file the WSD and appear in court to avail the Court with opportunity to determine the case.

The appellant's Counsel skipped the second ground of appeal and prayed that, this Hon. Court may for the interest of justice allow the appeal with costs.

In reply, Agness Dominic Advocate stressed on the point that the matter proceeded *ex-parte* before the trial Court. Thus, it is a settled principle of law in both statutes and case law that the burden of proof in any particular facts lies on the person who

alleged. This is as per Section 112 (1) of the Tanzania of Evidence Act Cap 6 (R.E. 2002).

Therefore, the fact that the respondent did not get chance to defend himself, does not mean that the burden of proof shifted from the applicant to the respondent. The court made findings from the evidence which was tendered by the appellant himself which is the discharge of the liability voucher.

The respondent counsel argued that the discharge of liability voucher was tendered as exhibit P3. It stated clearly that the appellant herein did receive the sum of TZs 32 Million paid in full and final settlement of all his claim.

The counsel told us that the respondent was not notified on the date of ruling. But the decision was in his favour. That is why the respondent did not challenge.

At this juncture, the respondent's Counsel referred us to the principle that is elaborated in the Book of **Sarkar and Manohar VR Sarkar Laws of Evidence 15th edition at page 1269**. It reads; -

> *"It is a cardinal rule of evidence, not one of technicality, but of substance, which it is dangerous to depart from, that where*

written document exists, they shall be produced has been the best evidence of their own contents...."

The respondent's counsel argued that it is reflected under Section 103 of the Evidence Act (TEA) Cap 6 (R.E.2002) which has the similar terms. That, Order No. XXXIX rule 27 of the Civil Procedure Code clearly state that at the appellate Court there is no any production of additional evidence whether written or orally. A fact that the appellant did not understood the language was not pleaded before the trial Court. Based on the proceedings attached in the memorandum of appeal, such fact was not pleaded. These are mere afterthought.

Further, as the Trial Magistrate elaborated, the said discharge voucher was signed in front of another person one Mr. Lism Rushamushumwa but this person was not brought to the Court to testify on whether the said amount was not paid or there were any other terms to that agreement which were not written. The reason being that the respondent was absent in that matter. Therefore, the discharge of the liability voucher was conclusive and the appellant did not prove his case on balance of probabilities.

Lastly, the Counsel said even the respondent himself after going through the plaintiff file observed some other errors that could not

justify the payments. For example, exhibit P3 which were receipts of the insurance cover, these were 2 receipts in which the first one was made before the accident. It was made on 2nd of November, 2014. The second receipt was made on 26th of March, 2015 which was three days after the accident occurred. The said accident occurred on 23rd of March, 2015. But the respondent did not get opportunity to challenge this before the trial Court. Therefore, the respondent prayed the appeal be dismissed with costs.

In rejoinder, the appellant's counsel started with the issue of receipt. He contended that the period of insurance according to the motor insurance cover note was from 21st of November, 2014 to 20th of November, 2015. The receipt depends on the premium payment time, by that time the premium was paid by installment or by credit.

The counsel argued that, the receipt was issued on 21st of November, 2014 and the accident occurred on 23rd of March, 2015. So, the respondent's argument has no leg to stand.

On new evidence point, the appellants' counsel rejoined that, from page 12 of the proceedings, the plaintiff signed the voucher but he was not paid. It is also repeated at page 14. It was testified during *ex-parte* proof of hearing of the case.

On the point of balance of probabilities, the counsel rejoined that the proof in civil cases is not that high. The rationale for the Civil Procedure is to require the plaintiff to file the plaint and the defendant to file WSD.

On the issue of language, the counsel told us that it did not feature in hearing. However, it was the counsel's submission that it should have relied not on signature only.

Before dealing with the grounds of appeal, I think it is important to point out the salient features meriting special consideration in this matter at this appeal stage. Foremost, the duty of this Court as the appellate Court is to weigh and evaluate the evidence for both the appellant against the respondent. (**see Ruwala v R 1957 EA 570**). However, the matter before the trial Court was heard *ex-parte*.

Therefore, I'm compelled to weigh whether the trial Court properly assessed the *ex-parte* evidence adduced by the appellant. In so doing, the Court will assess two issues; **one**, whether the discharge of liability voucher tendered as exhibit P3 clearly proved on balance of probabilities that the appellant herein did receive the sum of TZs 32 Million from the respondent as full and final settlement of all his

claim; **two**, whether the doctrine of *non est factum* may be raised successfully at appeal stage.

As regards the first issue on assessment of the evidence given by the appellant, I'm of inclined view that the payment of TZs 32 million cannot be proved on balance of probabilities through the discharge voucher alone without encashed cheque. The court ought to have found whether the appellant signed the discharge voucher by signifying acceptance of the offer made by the respondent. Indeed, the court out had satisfied itself on whether such offer was performed by the offeror by issuing honored cheque of the same value and cashed to the appellant in terms of Section 8 of the Law of Contract Act, cap 345 (R.E.2002).

In absence of honored cheque, I hold that the trial Magistrate erred in assessment of the discharged voucher as a conclusive proof of payment. In the case of **Engen Petroleum (T) Limited (appellant) vs Tanganyika Investment Oil and Transport Limited (respondent) Civil Appeal No. 103 of 2003 Court of appeal of Tanzania (unreported),** one of the issue was *whether the appellant fell short of proving the case on the balance of probabilities for lack of invoices or delivery notes to substantiate the claim for unpaid supplies of petroleum products.* In its decision, the Court held: -

"Ground two of the appeal has been made simpler by the concession by counsel for the appellant, 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 not paid for."

Though the facts in the afore **engen petroleum case** is distinguishable to our present case, the overriding issue here is the importance of proving a civil case on balance of probabilities or on balance of preponderance. Short of that the matter remain unproved. So, it is very crucial for the court to direct its mind on the yardstick of proof required in a case.

On the second issue, I'm of settled view that when a person signs a document not to his/her deed is entitled to raise a defence of *non est factum.* Such defence may be raised when the document is executed through misrepresentation to its nature and character due to the language used or defect of human soundness. However, the doctrine of *non est factum* has to be pleaded at the trial stage. It cannot be raised at appeal stage. For that reason, the appellant defence of *non est factum* at this stage is a mere afterthought.

Another defect I find in the trial proceedings is that the respondent was not summoned to receive the ex-parte decision. It was a requisite condition for the Court to had issued a summons for the appellant to attend the ex-parte judgment delivery. The reason behind was to let the respondent be aware of the decision delivered. The same condition was laid down in case of **Cosmas Construction Co. Ltd v. Arrow Garments Ltd 1992 TLR 127,** whereby the Court of Appeal of Tanzania held: -

> *"A party who fails to enter an appearance disables himself from participating when the proceedings are consequently ex-parte but has to be told when the judgment is delivered so that he may, if he wishes, attend to take it as certain consequences may follow"*

With the afore principle of law enunciated by the Court of appeal, it follows therefore that any part whether a plaintiff or defendant, claimant or respondent when the matter is heard one side in his/her absence, has the right to be informed on the date the decision will be rendered.

In the event of the foregoing, the appeal is hereby sustained with orders that the dismissal order of the appellant's suit before

the trial court is set aside. The matter be tried de-novo before the trial court by a different Resident Magistrate. The parties shall bear their own costs in this appeal and of the lower court.

Y. J. Mlyambina

Judge

28/06/2018

Dated and delivered this 28th day of June, 2018 in the presence of learned Counsels Julius Mancheka for the applicant and Agness Dominick for the respondent.

Y. J. Mlyambina

Judge

28/06/2018