IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL APPEAL NO. 403 OF 2021

SALUM HUSEIN SALUM..APPELLANT

VERSUS

LABSON DAUDI NKWAMA .... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 246 of 2018)

JUDGMENT

27th July & 26th August, 2022

KISANYA, J.:

The appellant, Salum Hussein Salum appeals against the decision of the Resident's Magistrate Court of Kisutu (Hon. J.H. Mtega, PRM) dated 1st October, 2021 in Civil Case No. 246 of 2018. In that case, the appellant was ordered to pay the respondent a sum of Tshs. 84,959,539 being specific damages for breach of supply agreement, general damages to the tune of Tshs. 5,000,000 and costs of the suit.

Before embarking into the consideration of merit or demerit of this appeal, I find it apt, albeit briefly to state the material facts giving rise to this appeal, as gathered from the record. The respondent was a businessman whose business included supply and sale of timbers. His place of business was Buguruni area, Dar es Salaam. It was alleged that in 2017, the appellant and respondent entered into an agreement for supply and sale of timber whereby

the latter undertook to distribute timber, receive payment for timber on behalf of the respondent and remit the same to the respondent. It was further alleged that in the course of executing the said agreement, the appellant failed to remit a sum of Tshs. 89,959,530/= to the respondent. Further to this, the respondent claimed that the appellant admitted the debt of Tshs. 89,959,530/= and that he undertook to pay the same. As the appellant neglected or failed to pay the said amount, the respondent sued him claiming for Tshs, 84,959,530/= being specific loss for breach of contract, general damages of not less than Tshs. 50,000,000/=, commercial interest on decretal sum and costs of the suit.

The appellant filed a written statement of defence in which he disputed the respondent's claim. He also disputed to have entered into any agreement with the respondent.

In that regard, the issues for determination of the dispute between the parties were framed and recorded as follows:-

1. *Whether there was an agreement to supply and sale of timber between parties.*
2. *Whether the plaintiff supplied to the defendant timber worth Tshs. 84,959,530/=.*
3. *To what reliefs are parties entitled to*.

Having heard evidence adduced by both sides, the trial court was convinced that the respondent had proved his case. It went on entering judgment and decree in his favour as hinted earlier.

Feeling that he was not accorded with justice, the appellant appealed to this Court on the following five grounds of appeal:-

1. *That the trial magistrate erred in both law and fact declaring that there was a contract to supply timber between the parties.*
2. *That the trial magistrate failed to properly evaluate the evidence adduced by the parties.*
3. *That the evidence of the appellant was wrongly ignored to the extent of considering exhibit P2 was made of free consent.*
4. *That the trial magistrate erred in both law and fact deciding that the respondent herein supplied timber worth Tsh. 84,954,530 to the appellant herein while the respondent failed to prove beyond required standard.*
5. *That the trial magistrate failed in law after deciding based (sic) on hearsay evidence.*

The hearing of this matter was preceded by way of written submissions. While Mr. Richard Mbuli, learned counsel filed written submission on behalf of the appellant, the respondent's written submissions were filed by Mr. Dickson Matata, also learned counsel.

In the course of submitting in support of the appeal, Mr. Mbuli opted to abandon the fifth ground of appeal. With regard to the first ground of appeal, he contended that the testimony of PW1 did not indicate the manner and time of the contract which the parties entered. He pointed out that Exhibit P1 shows that the timbers were delivered on 17/2/2017 while Exhibit P2 is to the effect

that the delivery date was 4/5/2017. In that regard, Mr. Mbuli faulted the trial court for concluding there was an agreement between the parties.

On the second ground of appeal, Mr. Mbuli submitted that the appellant admitted to have engaged in business with the respondent. He also admitted that the terms were to the effect that the appellant would take timber from the respondent, supply the same to his (appellant) customer and pay the respondent upon receipt of payment from the customer. However, the learned counsel contended that the trial court failed to properly analyse the evidence before it. He referred this Court to exhibit P1 which indicates that on 17/2/2017 there was a delivery of 1680 timbers valued at Tshs. 84,959,530.

It was further contented that, had the trial magistrate evaluated the evidence, he would have noticed that DW1 did not admit to have been supplied with timber worth Tshs. 84,959,530. The learned counsel went on submitting that the appellant was forced to sign Exhibit P2 in which he is said to have acknowledged the debt of Tshs. 84,959,530. His submission was based on the claim that the appellant was taken to Stakishari Police Station. Therefore, it was his argument that there was no free consent when the appellant signed Exhibit P2. Mr. Mbuli urged this Court to consider that the respondent did not cross examine the appellant on the fact that he was forced to sign Exhibit P2. Referring to the cases of **Nyerere Nyague vs R**, Criminal Appeal No. 67 of 2020 and **Leonard vs R**, Criminal Appeal No. 226 of 2014 (both unreported), he contended that such fact is deemed to have been admitted by the

respondent. On the foregoing reasons, the learned counsel was of the view that the trial magistrate wrongly ignored the appellant's evidence.

With regard to the third ground of appeal Mr. Mbuli reiterated his submission on the second ground. He submitted that the appellant's evidence was wrongly ignored and that the trial court considered Exhibit P2 which was made without his free consent.

As regards the fourth ground of appeal, Mr. Mbuli faulted the trial court for holding that the respondent supplied to the appellant timber worth Tshs, 84,954,530. Making reference to Exhibit P1, the learned counsel argued that the consignment was not worth Tshs. 84,959,530. He contended that the amount included other building materials which were supplied to Esteem Construction Company. He expounded that the value of 1680 timbers appearing in Exhibit P1 was Tshs. 1,224,500 and that the claimed amount of Tshs. 84,959,530 included previous debt of Tshs. 77,714,530 thereby raising doubt on whether the parties entered into a contract. He further submitted that the appellant paid for all timbers taken from the respondent.

In the light of the above, Mr. Mbuli argued that the trial court's failure to evaluate the appellant's evidence led to miscarriage of justice. To support his argument on this ground, the learned counsel cited the case of **Leonard Mwanashoka vs Republic**, Criminal Appeal No.226 of 2014 and the case of

Yusuph Amani vs Republic, Crim. Appeal No.225 of 2014 (unreported). He therefore, prayed that the appeal be allowed with costs.

In his response, Mr. Matata opted to argue the first and fourth grounds of appeal altogether. He submitted that the appellant did not dispute the existence of a business relationship between him and the respondent which involved the supply of timber. He also submitted that the trial court was convinced that there existed the contract within the meaning of section 10 of the Law of Contract. It was his further submission that the contract may be in writing or by implication from the conduct of the parties. To bolster his argument, Mr. Matata cited section 5 of the Sales of Goods Act and the case of **Kibogate Tanzania Limited vs Grandtech (T) Limited**, Commercial Case No.32 of 2021.

With regard to proof of Tshs. 84,954,530 claimed in the plaint, Mr. Matata submitted that the standard of proof required to prove the same was on the balance of probabilities. He went on contending that the respondent's evidence before the trial court was more probable than that of the appellant. His contention was based on the reason that the appellant did not produce evidence to prove to have paid for the timbers taken from the respondent.To cement his argument, Mr. Matata cited the case of **Miller vs Minister of Pension** (1947) ALL E.R. 372; 374.

Responding to the second ground of appeal, Mr. Matata briefly submitted that the appellant failed to prove the payments made to the respondent. He referred me to the case of **KCB Bank Tanzania Ltd vs Sunlon General Building Constructors Ltd and 2 Others**, Commercial Case No. 73 of 2013, HCT Commercial Division at DSM (unreported) where it was held that an adverse inference will be drawn against a party who fails to tender a material document.

As regards the third ground of appeal, Mr. Matata submitted that there was no proof that Exhibit P2 was entered under coercion before Stakishari Police Station. He further submitted that the issue before the trial court was whether the plaintiff supplied the defendant with timber worth 84,959,530. It was his submission that upon scrutiny of evidence of both sides, the trial court was satisfied that the appellant's evidence was weaker compared to that of the respondent. He relied on the case of **Hemed Said vs Mohamed Mbilu** (1984) TLR 113. On the basis of his submission, Mr. Matata moved me dismiss the appeal with costs for being devoid of merit

I have closely considered the submission from both sides and examined the record. The main issue is whether the appeal is meritorious or otherwise.

Starting with the first ground, the issue is whether the parties entered into a binding agreement as between themselves. In terms of section 10 of the Law of Contract Act, all agreements are contracts if they are made by free

consent of the parties who are competent to enter into a contract, for a lawful consideration and with a lawful object and are not verge of being declared void. It is also settled law that a contract is initiated by an offer from one party. Upon the said offer being accepted by the other person, it is becomes binding. As far as sale contract is concerned, section 5(1) of the Sales of Goods Act is to the effect that such contract may be deduced from conduct of a party to the contract. For instance, if there is no written contract, the supply or sale contract may be proved, among others, by establishing that the goods were supplied to another person for a price and that the said person received and retained the goods in question. [See the case of **Kibogote Tanzania Limited** (supra) where it was held that:-

> *".... it follows, in essence, that, with or without a formal written agreement, when a party proves to have supplied goods to another for a price (consideration), and the other party receives and retains such goods, an inference may be readily drawn to the effect that, the two parties are in a contract of supply.*

In another case of **NBC Limited & Another vs Bruno Vitus Swalo**, Civil Appeal No.331 of 2019 (unreported), the Court Appeal had this to say on what amounts to a contract: -

> *"Looking at the nature of the transaction, it is evident that the parties entered into a legally recognized sale agreement. That contract was in accordance with section 10 of the Law of Contract Act, Cap. 345 R. E. 2002 (now*

Cap. 345 R. E. 2009) (the LCA) which provides, in part, that: -

> *"10. All agreements are contracts 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."*
>
> *The parties had the capacity to enter into a valid contract, for according to the pleadings, they are legal persons with capacity to sue or be sued. They were competent to contract in terms of section 11 of the LCA.'"*

Reverting to the instant case, the respondent testified to have entered into an agreement with the appellant. His evidence was to the effect that, from 2015 to early 2017, the appellant took building materials from him (respondent). It was his further evidence that the duo agreed that the appellant would pay back the money after selling the goods supplied to him. In his defence, the appellant admitted that he took timber from the respondent. He also admitted that their arrangement was for the appellant to pay for the timber that was taken from the respondent after selling the same. For instance, the appellant who testified as DW1 adduced as follows:-

> *"I know the plaintiff Robson since 2014 when I was doing business of timbers. He is also a businessman of timber. I was taking timbers to make (sic) plaintiff when I got a tender. When I went to the plaintiff to take the timbers, we were always recorded (sic) in a book. Then I took the*

certain amount of timbers from him and went to sale. I paid the plaintiff through his bank account. I paid the plaintiff due money related to the timer I took from him."

In the light of the above, it is clear that the appellant admitted that there was a contract between him and the respondent. Since neither party tendered into a written agreement, it is my considered view that their agreement was oral and that it was proved by their conducts. That being the case, the first ground of appeal is devoid of merit.

I prefer to consider the third ground of appeal before reverting back to second ground of appeal. The said ground is centred on the validity of Exhibit P2 which was duly considered by the trial court. In terms of Exhibit P2 which is titled "Hati ya Makubaliano" (Memorandum of Understanding), the appellant admitted the debt of Tshs. 84,959,530. He undertook to pay the said debt within two months from 4th May, 2017. It is the appellant's contention that he was forced to sign Exhibit P2.

It is settled law provided for under sections and 110 of the Evidence Act that a person alleging on existence of certain facts is duty bound to prove the same. See also the case of **Geita Gold Limited & Another vs Ignas Athanas**, Civil Appeal No.227 of 2015, in which the Court of Appeal cited with approval the case of **Anthony M. Masanga vs Penina (mama Mgesi) & Another**, Civil Appeal No.118 of 2014 where it was held that:

" let's begin by re-emphasizing the ever cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law Evidence Act, Cap. 6 of the Revised Edition, 2002."

Having examined the evidence on record, I agree with Mr. Matata that the appellant did not prove that he was forced to sign Exhibit P2. I hold so basing on the following reasons.

One, the record bears it out that apart from being deposed in the plaint, Exhibit P2 was appended to the plaint served to the appellant. Now, the fact that Exhibit P2 was signed under coercion was not averred at all in the written statement filed by the appellant. Had the appellant pleaded that fact, the trial court would have recorded the issue whether he was forced to sign the same.

Two, Exhibit P2 was tendered by the appellant (PW1). He also called Balozi Simoni Meena (PW2) who testified to have witnessed the appellant signing Exhibit P2. Both PW1 and PW2 were not cross-examined on the contention that the appellant was forced to sign the same. As that was not enough, neither PW1 nor PW2 was asked whether Exhibit P2 was recorded at the police station. In terms of the settled law, the appellant is taken to have admitted evidence adduced by PW1 and PW2. Since his defence that Exhibit P2 was signed under coercion was not disclosed in the written statement of defence and during the plaintiff's case, it is considered to be an afterthought.

Third, the appellant did not produce evidence to prove that he was forced to sign Exhibit P2. Further to this, the appellant did not prove that he was taken to Stakishari police station. This is so when it is considered that the police case number (RB) in which he was admitted on police bail was not mentioned.

On the foregoing reasons, I agree with the counsel for the respondent that the third ground lacks merit as well.

Last on consideration is the second and fourth grounds which are premised on the complaint that the trial court failed to evaluate evidence adduced before it. Having examined the record, I am of the considered view that the said grounds should not detain this Court. As stated earlier, the second issue recorded during the trial was whether the plaintiff supplied to the defendant timber worth Tshs. 84,959,530/=. I have also indicated in this judgment that the appellant did not dispute that he took timber from the respondent on the arrangement that he would pay after selling the same to his customer. Now, the respondent's case is to the effect that the appellant did not pay goods worth Tshs. 84,959,530. He tendered in evidence the memorandum of understanding (Exhibit P2) in which the appellant admitted the debt of Tshs. 84,959,530. His evidence was supported by PW2, one of the persons who witnessed the parties signing Exhibit P2. It was his further evidence that, Exhibit P2 was written by the appellant himself.

On the other hand, the appellant alleged to have paid for all goods supplied to him. He claimed to have deposited some money to the respondent's account. However, no bank deposit slip was tendered to prove that the appellant actually paid for the timber supplied to him. It is also not vivid whether the appellant fulfilled his obligation by paying the whole sum owed upon receiving the timber or the extent of amount remained from the disputed amount which was awarded to the respondent by the trial court. Such fact was also considered by the trial court when it held as follows:-

> *"Nevertheless, the defendant in his defence admitted to receive such number of timbers, and alleged that he already paid the plaintiff through the plaintiff's bank account. However, the defendant had not furnished this honourable court with the pay in slip forms to prove his allegation."*

I have further considered the appellant's complaint that his defence was not considered. The above cited evidence shows that the trial court was satisfied that the respondent did not furnish evidence to prove his allegation. Indeed, apart from failing to produce evidence showing payment for the timber supplied to him, the appellant did not prove that he was forced to prove Exhibit P2 which formed the basis of the decision of the trial court. It is vivid that the trial court properly analysed and weighed the evidence from both sides before arriving at a conclusion that the respondent was entitled to the disputed

amount. Therefore, the second and fourth grounds of appeal are devoid of merit.

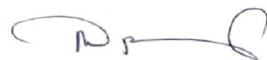
All said and done, I find no merit in this appeal. It is accordingly dismissed with costs.

DATED at DAR ES SALAAM this 26th day of August, 2022.

S.E. Kisanya
JUDGE
26/08/2022

Court: Judgment delivered this 26th day of August, 2022 in the presence of Mr. Dickson Matata, learned advocate for the respondent and also holding brief for Mr. Richard Mbuli, learned advocate for the appellant.

Right of appeal explained.



S.E. Kisanya
JUDGE
26/08/2022