IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA
DC. CIVIL APPEAL NO. 8 OF 2015

(Original Tandahimba District Court (J.J Waruku, RM) Civil Case No. 4 of 2015)

NAMAHONGA AMCOS.....1ST APPELLANT

MCHICHIRA AMCOS.....2ND APPELLANT

TANDAHIMBA NEWALA

COOPERATIVE UNION LTD (TANECU).....3RD APPELLANT

VERSUS

HAMISI ABDALLAH.....1ST RESPONDENT

RASHID ATHUMANI MANDANJE.....2NDRESPONDENT

02/08/2016 & 30/11/2016

J U D G M E N T

Twaib, J:

The respondents Hamisi Abdallah and Rashidi Athumani Mandanje commenced a suit against the appellants at the District Court of Tandahimba through Civil Case No. 4 of 2015. They claimed for several reliefs, including payment of Tshs 41,101,200/= being the outstanding amount, for cashewnuts supplied to the appellants and Tshs 33,291,972/= being interest at 3% for loss of business. The trial magistrate having heard the parties on merits delivered judgment in favour of the plaintiffs (respondents herein). The appellants who were the defendants were dissatisfied, hence the instant appeal which is based on four grounds.

Before me, the appellants were represented by Mr. Kibasi learned advocate while Mr. Lekey, learned advocate, represented the respondents. Hearing of the appeal proceeded by way of written submissions. However, in the course of replying to the

appellants' written submissions in support of the appeal, the respondents raised a preliminary objection on point of law to the effect that the appellants' appeal is time-barred. The appellants on the other hand, while complaining that it was unprocedural to raise a preliminary objection in written submissions, nevertheless responded to the point through a rejoinder to the written submissions stating that the appeal was not time-barred.

It is correct to say that it was unprocedural for the respondent to raise a preliminary objection in the course of submissions, as was similarly held by this court in the case of **Morogoro Ceramic Wares Ltd (Under Receivership) v George Carlo & 17 Others**, Civil Revision No. 151 of 2002 HCT at Dar salaam (unreported) at Page 2:

> *"…it was unprocedural to raise a preliminary objection in the written submissions…But since the jurisdiction of this court is being challenged, I have to determine the objection first."*

In the case at hand, both sides had an opportunity to address the issue of limitation of time in their submissions. Thus, it being an important point of law, there will be no failure of justice if the court entertains it as I now proceed to do (see the case of **Haroon Pirmohamed v Masayuki Soyejima**, Civil Case No. 105 of 2011 (HCT-DSM, unreported).

In his argument in support of the preliminary objection, Mr. Lekey submitted that the appellant's appeal is time barred. He contended that the copy of the judgment was certified on 26th November 2015, but this appeal was filed on 29th December 2015, about 33 days from the date the appellant was supplied with copies. He argued that since the limitation of time for an appeal from District Court to this court is thirty days, by filling the appeal 33 days later, the appellant were out of time for three days.

Responding to these submissions, Mr. Kibasi admitted that the copies of judgment and decree were certified on 26th November 2015 and the appeal was filed on 29th December 2015. He however submitted that the documents were not supplied to the

appellant on the date they were certified, but on 23rd December 2015. Hence, having filed the appeal on 29th December 2015, the appellant took only six days to file it.

The parties are therefore not in dispute on the date the judgment and decree were certified. The dispute is on the date the documents were supplied to the appellant. The appellants say that they were supplied with the same 23rd December 2015. However, the appellants did not produce any exchequer receipt showing the date they paid for their copies. In the absence of that evidence, the assumption that the certified date was the date when they were supplied with the copies has remained unchallenged. I therefore agree with Mr. Lekey that the appellants' appeal was filed 33 days from the date the certified copies were issued to the appellants.

However, with respect, I do not agree with Mr. Lekey on his argument that appeals from the District Court to this court in the exercise of its original jurisdiction must be lodged within 30 days. The Magistrates Courts Act has no provision to that effect. Section 25 (1) (b) of the Magistrates Courts Act provides for a limitation of time of 30 days in relation to appeals emanating from the District Court in the exercise of its appellate or revisional jurisdiction and not in the exercise of its original jurisdiction. In such circumstances, recourse must be made to Part II item 2 of the schedule to the Law of Limitation Act, Cap 89 R.E 2002 which prescribes the period for appeals made "under any written law" (meaning where no specific period is provided) as 45 days.

The instant appeal arises from the District Court in the exercise of its original jurisdiction. There is no provision in either the Magistrates Courts Act or any other written law for a limitation of time in respect of the same. Thus, such appeal may be filed within 45 days under item 2 above-quoted. Hence, the appeal is not time barred. I therefore dismiss the preliminary objection.

I now turn to the merits of the appeal. In support of the first, second and third grounds, Mr. Kibasi submitted that the respondents entered into a sale contract with the appellants for the sale cashew nuts for a consideration of Tshs 1,200/= per kilogram. The consideration was to be paid in two installments—fifty percent (which

was Tshs 600/=) was to be paid upon delivery of the cashew nuts and the balance of fifty per cent upon auction of the same.

Mr. Kibasi argued further that both the appellants and respondents testified that the advance was duly paid but the balance has not been paid. He argued that the auction was to be effected by the third defendant, but the contract was frustrated as the subject matter, the cashew nuts, were stolen. There is a pending case in this Court, he said (Civil Case No. 3 of 2014 between TANECU v Agrofocus Co. Ltd.) for a claim for damages in respect of the stolen cashew nuts. He was of the view that the trial court did not consider the appellants' testimony, which is why it arrived to an erroneous decision.

On the last ground, Mr. Kibasi submitted that the claim of interest by the respondents was baseless. It was his view that as a matter of fact and law, interest prior to the filling of the suit must be pleaded. Failure to plead is fatal and renders the claim untenable. In support of his proposition, he cited the case of **Francis Andrew v Kamyn Industries (T) Ltd.** (1986) TLR 31. He concluded that the trial Court was wrong to award high interest to the respondent, as the same was not proved.

On his part, Mr. Lekey responded that it was an undisputed fact that fifty per cent of the agreed price of cashew nuts was not paid, and that was the reason for the suit that was instituted at Tandahimba District Court. He further submitted that, the contract of sale is characterized by a number of features. One of them being that when the property in the goods are transferred to the buyer, whichever risk that is associated with the property passes to the buyer. Hence, the appellants cannot seek refuge under the doctrine of frustration as the respondents delivered the goods and the title passed to the buyer. The goods were stolen in the hands of the buyer, and thus cannot affect the transaction.

Mr. Lekey further argued that the allegation that the remaining fifty per cent was to be paid upon auction of the cashew nuts was a new fact which was not pleaded before the trial court and hence cannot be decided on appeal. He cited the case of **Hotel**

Traventine Ltd. and two others v NBC [2006] TLR 133 at page 141 to cement his argument. He further submitted that if the goods were stolen while in the custody of TANECU, the only right the seller has is an action for the price, per section 50 of the Sale of Goods Act, Cap 214 R.E 2002.

On the issue of interest, Mr. Lekey submitted that the claim for interests is pleaded in the plaint and that the trial court was right in awarding interest to the respondents.

Having gone through the evidence on the record and considered the submissions of the parties on the grounds of appeal, it is beyond dispute that the parties herein entered into a contract of sale, whereby the 1st and 2nd respondents delivered to the appellant cashew nuts weighing 53,240 kgs and 15,258 kgs respectively. The price agreed was Tshs 1,200 per kilogram, which was to be paid in two installments. It is also not in dispute that the appellants paid half of the price, that is Tshs 31,944,000/= to the 1st respondent and Tshs 9,154,800/= to the 2nd respondent as first installment. The appellants admitted in their testimony that the other half (a total of Tshs. 41,101,200/=) which had to be paid as a second installment has never been paid to date. In trying to justify the reasons for failure to pay the last installment, the appellants' witness Hamisi Saidi Kungapa (DW1) testified as follows:

> *"In the seasonal period of 2012/2013, I bought the cashew nuts from the 1st and 2nd plaintiffs at the agreed price TSH 1200/= per each kg and we paid them half of the payment but we never paid them rest outstanding balance. This is because the cashew nuts which we placed before TANECU were stolen by the store keeper. The case is before the court. There are many peasants who are not paid up to date if this court grants plaintiffs such reliefs they pleaded, our organization will collapse."*

This purported justification is reflected in the second and third grounds of appeal, to the effect that the second payment could not be paid due to reasons which were beyond the appellants' control as the cashew nuts were stolen and thus no auction could be conducted. This, according to their counsel, amounted to frustration of contract as the events made further performance of the contract impossible.

The issues arising therefore are: One, whether the doctrine of frustration of contract is available to the appellants in the circumstances of this case, such that they can be excused from paying the remainder of the purchase price; and two, whether, if the main finding on liability was correct, the order for interest was justified in law.

The doctrine of frustration may be invoked where events occur that make the performance of the contract impossible, i.e., where the frustrating events are not the fault of either party: See the case of **M/S Kanyarwe Building Contract v The Attorney General and Another** [1985] TLR 61. In the case before us, the respondents performed the whole part of their bargain by delivering the cashew nuts to the appellants.

The appellants, on the other hand, performed only half of their bargain by paying half of the purchase price. It cannot be said, in the circumstances, that the contract was incapable of performance. The fact that the goods were subsequently stolen in the hands of the buyers could not, by itself, exonerate them from performing the remaining their part of the bargain. It cannot be a ground for denying the respondents of their last installment. In their written statements of defence, the appellants did not plead anything relating to the doctrine of frustration and even in the course of the trial the doctrine of frustration was not one of the issues. Hence, there was no basis upon which the trial court would have formed an opinion on the same. In fact, even raising it at this stage was not available to them.

It may also be stated, *obiter*, that by accepting delivery of goods before full payment of the purchase price, the buyers practically became the bailees of the goods to the extent of the unpaid price. As such, they had a duty to exercise care in keeping the goods as required under section 103 of the Law of Contract Act Cap 345 R.E. 2002, pending final payment of the purchase price. If the goods were subsequently stolen, the buyer became responsible to the seller for the unpaid price, unless he could prove to the satisfaction of the court that he exercised due care in keeping the goods and

that such stealing would have occurred even if the goods were to remain with the seller himself.

Furthermore, it is not the duty of the respondents (seller) to show that the cashew nuts were stolen because the appellants (buyer) did not properly keep them. It is however a settled principle that upon loss or damage of the goods, the burden is on the buyer (bailee of goods) to prove that he has exercised due care in ensuring the safety of the goods: See the cases of **Dodd v Nandha** [1971] EA 58; **Cooper Motors Corporation (T) Ltd v Arusha International Conference Centre** (1991) TLR 165 (CA); **Morris C.W Martin & Sons Ltd.** (1965) 2 ALL ER 725.

On interest, there is unchallenged evidence on record that the second instalment of TSh. 41,101,200/= as principal sum due to the respondents from the appellants was never paid. However, interest before fling of the suit is a matter of substantive claim and thus in the nature of specific damages. In the case of **Francis Andrew v Kamyn Industries (T) Ltd.** [1986] TLR 31 (Bahati, J), it was held by this court that interest must be pleaded, and must be placed under a particular head. However, the learned Judge stopped short of holding that interest must be specifically proved. In the present case, the plaintiffs did claim interest, and, apart from interest at court rate, they put it under two heads [(ii) and (iv)] as follows:

> (ii). Payment of 33,291,972 being interest at 3% per month from November 2012 to date [of filing the suit] for loss of business and profit.
>
> (iv). Commercial interest at 12% from the date of filing to the date of full payment.

Hence, the appellant did claim for interest in the above terms. The trial Court granted both these heads of interest as claimed. However, even though Bahati J. did not say that interest must be proved, I am of the considered view that it all depends on the nature of interest and the amount claimed. I think item (ii) above, being based on loss

of business and profit, required specific proof. No such evidence was led at the trial. It was thus wrong for the District Court to award it.

As for the interest under item (iv) (commercial interest at 12%) from date of judgment to date of full payment, the same is, in my view, wrongly worded. Interest after judgment is never commercial. It is interest at court rate. It is, however, usually grantable as a matter of course whenever a monetary relief is granted. It need not be proved at all. The claimed rate of 12% is the maximum allowed by law. In the circumstances of this case, I think the respondents were entitled to it, and I would grant them the same.

In the upshot, I order as follows:

1. I confirm the District Court's award of the principle sum of Tshs. 41,101,200/=.
2. I quash and set aside the orders of interest contained in items (ii), (iii) and (iv) in the reliefs granted by the District Court and, invoking this Court's powers of revision, I substitute the same with an order for interest on the principle sum of Tshs. 41,101,200/= at the simple interest at court rate of 12% per annum from the date of delivery of the judgment of the District Court to the date of full payment.

To the extent explained above, the appellants' appeal is partly dismissed and partly allowed. Since the appeal has only partially succeeded, I will make no orders as to costs. Order accordingly.

DATED and DELIVERED at Mtwara this 30th day of November, 2016.

F.A. Twaib

JUDGE