IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., MSOFFE, J.A., And KAJI, J.A.

CIVIL APPEAL NO. 103 OF 2003

ENGEN PETROLEUM (T) LIMITED ..... APPELLANT

VERSUS

TANGANYIKA INVESTMENT OIL
AND TRANSPORT LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Commercial Division, At Dar es Salaam)

(Kimaro, J.)

dated the 29th day of August, 2003
in
Commercial Case No. 268 of 2001

JUDGEMENT OF THE COURT

MUNUO, J.A.:

The appellant, Engen Petroleum (T) Ltd. is challenging the decision in Commercial Case No. 268 of 2001 which Kimaro, J. determined in favour of the respondent Tanganyika Investment Oil and Transport Ltd., on the 29th August, 2003. In the said suit, the appellant plaintiff had sued for unpaid supplies of petroleum products namely:

(1) US Dollars 197,218.85 and Tsh 125,323,309.63 unpaid price for petroleum products supplied to the respondent;

(2) US Dollars 23,667 and Tsh31,748,572 being interest on the above sum of money retained by the defendant in breach of the agreement to purchase petroleum products;

(3) Interest on items (1) and (2) at the bank rate from the date of the institution of the suit to the date of settlement of the claim in full;

(4) Costs of the suit and

(5) Any other relief deemed fit by the Court.

The defendant counter-claimed for:

(a) the sum of Tsh 65,361,737.89 and US Dollars 553,198.12 interest on the counter-claim.

(b) Set off the claim proved the defendant owes the plaintiff;

(c) costs of the suit; and

(d) any other relief deemed fit by the Court.

The learned trial Judge dismissed the suit with costs. She allowed the counter-claim with costs. Dissatisfied with the decision of the trial court, the appellant plaintiff, through the services of Mr. Mbuna, learned advocate filed the present appeal to challenge the

decision of the High Court. In the High Court Mr. Mchome, learned advocate from Mbuna & Co. Advocates prosecuted the suit which had been instituted by Mr. Kiwango, learned advocate. The present appeal was prosecuted by Mr. Mujulizi, learned advocate. Mrs. Bade and Mr. B. Chipeta, learned advocates, defended the suit in the High Court. Mr. W. Chipeta, learned advocate, represented the respondent in this appeal.

Although the learned Judge erroneously held that there was no contract of sale of petroleum products between the parties, a careful scrutiny of the evidence, conduct of the parties and the circumstances of the case established that there was an oral contract of sale of petroleum products by the appellant plaintiff company to the respondent defendant company. Under the said oral contract of sale of petroleum products, the appellant claimed that it supplied petroleum products valued at US Dollars 197,216.65 and Tsh 125,323,369.65 to the respondent company which supplies had not been paid for giving rise to the suit.

Denying the claim for unpaid supplies of petroleum products, the respondent counter-claimed for US Dollars 65,361,737.89 and

interest thereon at US Dollars 460,998.65, deposited credit for which the appellant had not delivered petroleum products.

Dismissing the suit, the learned Judge held:

> --- Again PW1 talked of payment being made after supply of products, followed by raising invoices. Yet there was no evidence of any credit arrangement between the parties. DW2 said the transactions between the parties were not carried out on credit arrangements.
>
> As already stated there is nothing relevant on the delivery notes and invoices linking them with proof of the plaintiff's case. From the evidence on record, I make a finding that the plaintiff has not only failed to prove existence of any agreement but it has also failed to prove that in their business transactions there were products which were supplied to the defendant and the defendant failed to make payment. The plaintiff's case is dismissed with costs.

The learned trial Judge had the following to say on the counter-claim:

> The defence evidence (DW1) as corroborated by DW2 and also PW2 was that the defendant asked for statements of their Accounts as per Exhibit D2. A reconciliation of the final collection and deposits made to the plaintiff reflected a credit balance in favour of the defendant. The statements were for 31st December 2000. The statements were tendered in Court and admitted as Exhibit D3. Account No. 2032 shows a credit balance of Tsh 54,468,114.91. Account No. Y032 shows a credit balance of US Dollars 460,998.43. There was no other transaction between the parties after 31st December, 2000 ---

The learned Judge further held:

> Indeed the statement for Account No. 2032 has entries for unapplied cash, all of them totaling 54,468,114.91. For Account No. Y032 there are six entries of unpaid cash and the total is US Dollars 460,998. For Account No. X001 the credit balance is 0.

The learned trial Judge concluded:

> The assessment carries me to a conclusion --- the defendant paid to the plaintiff an excess amount of (a) US Dollars 460,988 and Tsh 54,468,114.91 as reflected by Exhibit D3 --- Thus while the plaintiff failed totally to prove its case, the defendant managed to prove the counter-claim on a balance of probabilities as required by the law. I will thus enter judgement for the defendant on the counter-claim as prayed for with costs.

Challenging the decision of the High Court, the appellant filed five grounds of appeal. At the hearing, counsel for the appellant abandoned grounds 3 and 5.

Submitting on ground one of the appeal, counsel for the appellant faulted the learned Judge for framing wrong issues, contending that issue one ought not to have been included. Inclusion of issue one, counsel contended, caused the learned Judge to misdirect herself and hence erroneously finding that –

> The defendant denied the existence of the agreement.

Counsel asserted that the said finding is incorrect because nowhere in the Written Statement of Defence did the respondent deny the existence of the agreement of sale of petroleum products by the plaintiff to the respondent. The trial court therefore erroneously held that –

> --- from the evidence of both sides --- there was only a business arrangement between the parties ---

Counsel for the appellant maintained that framing issues wrongly led to wrong findings which in turn occasioned a failure of justice. Claiming that the trial was unfair and flawed by including issue one among the issues for determination, counsel for the appellant urged us to rectify the irregularity by nullifying the proceedings, judgement and decree and ordering a retrial.

On ground two of the appeal, counsel for the appellant contended that PW1 and PW2 established that the parties had a running account. He conceded, however, that the evidence adduced by these two witnesses for the appellant, fell short of proving the appellants case on the balance of probabilities because no invoices,

and, or delivery notes were tendered to substantiate the claim for unpaid for supplies of petroleum products.

With regard to the award of interest on the counter-claim, counsel for the appellant contended that the said award of interest was unjustified for the reason that it was not proved that the sale agreement provided for payment of interest. Counsel for the appellant prayed that the appeal be allowed with costs.

Mr. W. Chipeta, learned counsel for the respondent urged us to uphold the issues which were framed by trial Judge initially Nsekela, J. as he then was, because he framed the issues with the assistance of counsel for the parties so no injustice was occasioned to either party and as such there is no need for a retrial.

Contending that the decision appealed against is strongly supported by the evidence on record, counsel for the respondent observed that although PW1 said there was a sale agreement and was given an opportunity to produce the alleged agreement at the trial, no such agreement was forthcoming. On the contrary, counsel for the respondent pointed out, the respondent tendered statement

of accounts Exhibit D3 to substantiate the counter-claim which the trial court rightly allowed because it was proved on the balance of probabilities.

Counsel for the respondent further urged the Court to uphold the interest on the counter-claim because Section 29 of the Civil Procedure Code, 1966, allows the Court to award interest on monetary debts. He prayed that the appeal be dismissed for lack of merit.

We shall determine three issues in this appeal namely –

1. whether issue one in the trial occasioned a failure of justice;

2. whether the appellant plaintiff proved its claim of unpaid for petroleum products supplied to the respondent; and

3. the propriety of the award of interest on the counter-claim.

We need not be detained on the matter of issues framed at the commencement of the trial because the said issues were framed in

compliance with the provisions of Order XIV Rule 3 of the Civil Procedure Code, 1966 which states, inter alia:

> 4. The Court may frame issues from all or any of the following materials:
>
> (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;
>
> (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;
>
> (c) the contents of documents produced by either party.

The record shows that the issues were framed with the assistance of counsel for either party and that the said issues arise from the pleadings. The complained of issue one which is alleged to have occasioned a failure of justice reads:

> (1) whether or not there was an agreement between the plaintiff and the defendant under which the plaintiff undertook to sell petroleum products to the defendant.

We think the said issue one is material because it is the foundation of the sale of petroleum products by the appellant plaintiff to the respondent purchaser. The sale agreement, we hasten to say, falls under the provisions of Section 3 (1) of the Sale of Goods Act, Cap. 214 which states:

> 3 (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price, and there may be a contract of sale between on part owner and another.

We are reinforced in this view by the provisions of Section 5 (1) of the Sale of Goods Act, Cap. 214 which states:

> 5 (1) Subject to the provisions of this Act and of any other written law in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

We are satisfied that the transaction involving the parties to this suit was an oral sale contract of petroleum products under which the

appellant supplied petroleum products to the respondent for the due price of money in US Dollars, and, or local currency. As already stated above, issue one was the foundation stone of the sale contract of the parties. It did not, in our considered view, occasion any injustice to either party. For that reason, we find no merit in ground one of the appeal.

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. On the contrary, letter, Exhibit D1 shows that with effect from the 7th February, 2000, all sales of petroleum products to the respondent would be in cash terms. The letter, Exhibit D1 speaks for itself:

ENGEN
Petroleum

07 February, 2000

Tanganyika Investment Oil &
Transport Co. Ltd.
P.O. Box 5999,
Dar es Salaam.

Att: Islam

Re: CHEQUE PAYMENTS

Please refer to the above captioned subject.

Following the non-payment of your cheque Management has decided that from today we will only accept cash or bankers cheque for all your payments to Engen. Therefore by this letter all your pending payments should be on cash basis.

Yours truly,

Osias Mwanyika
Credit Manager

The parties conceded that all the dishonoured cheques were replaced by cash and that the respondent used to deposit cash for petroleum products which is why the statement of account, Exhibit D3, has a credit balance, the subject of the counter-claim which is not being appealed against save for the interest thereon.

That the appellant plaintiff failed to prove the claim on the balance of probabilities is further supported by the testimonies of PW1 and PW2. PW1 Andrew Ezekiel Mushi stated in cross-examination:

> --- I cannot analyse the statement. I cannot talk of the invoices. The statements were

> being issued by the accounts. --- I cannot say which payment was being made there and then and which was being paid for after sometime --- I do not know whether the defendant is the one who has claims over us --- The Finance Department are the ones who know about payment by TIOT ---

PW2 Tumaini Mkonya, the Chief Accountant of the appellant did not fare better. He admitted in cross-examination:

> --- I cannot say with certainty which invoices were paid for and which were not paid for. Sometimes however, money is deposited by a client without collection of fuel. The customer account gets credit balance ---

From the evidence of PW1 and PW2 we are clear in our minds that the trial court rightly dismissed the suit for lack of proof on the balance of probabilities. We accordingly find no merit in ground two of the appeal.

With regard to ground four of the appeal, counsel for the respondent rightly pointed out the provisions of Section 29 of the Civil Procedure Code, 1966 on interest. Section 29 provides:

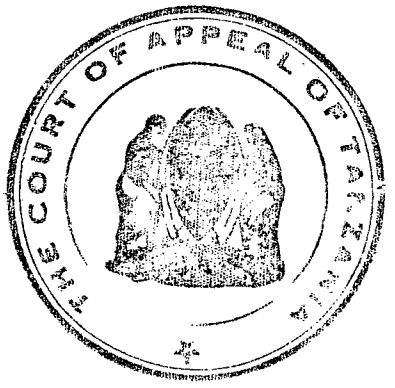
> 29. The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgement debts, and, without prejudice to the power of the court to order interest to be paid up to the date of judgement at such rate as it may deem reasonable, every judgement debt shall carry interest at the rate prescribed from the debt of the delivery of the judgement until the same shall be satisfied.

We take judicial notice of the mercantile practice of paying interest on debts. We think interest on petroleum product sales debts, the subject of the present case, ordinarily attracted interest under mercantile practice. Our view is fortified by the provisions of Section 29 of the Civil Procedure Code, 1966 reflected above. The said provision recognizes interest on judgement debts so the learned Judge rightly allowed interest on the counter-claim. The interest allowed on the counter-claim was 2.5% per month as pleaded under paragraph ten. At that rate, the interest on the counter-claim would be 2.5% x 12 months = 30% interest on per annum which exceeds the current bank rate of interest. Under the circumstances, we vary the interest on the counter-claim to be at the current bank rate per

annum from the date of filing the counter-claim to the date of judgement and interest at the court rate of 7½% per annum from the date of judgment to the date of final settlement.

Save for the variation on the interest rate on the counter-claim, the appeal is lacking in merit. We accordingly dismiss the appeal with costs.

DATED at DAR ES SALAAM this 08th day of September, 2005.



E.N. MUNUO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR