IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MUSSA, J.A. And MUGASHA, J.A.

CIVIL APPEAL NO. 38 OF 2012

CHARLES RICHARD KOMBE t/a BUILDING ..... APPELLANT

VERSUS

1. **EVARANI MTUNGI**
2. **MOHAMED LWIZA**
3. **GENERAL SERVICES & CONSTRUCTIONS CO. LTD.**

..... RESPONDENTS

(Appeal from the judgment and decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Bukuku, J.)

dated the 5th day of September, 2011
in
Commercial Case No. 65 of 2009
.....

JUDGMENT OF THE COURT

13th February, & 24th March, 2017

LUANDA, J.A.:

The above named appellant unsuccessfully sued the respondents jointly and severally in the High Court of Tanzania (Commercial Division) for a recovery of a sum of Tshs. 46,000,000/= being an amount due from and owing to the respondents on account of dishonoured cheques. Bukuku, J. dismissed the suit on the ground that the appellant failed to

prove his case on a balance of probabilities and at some stage she said the appellant was unable to prove to have suffered loss "beyond reasonable doubt". Be that as it may, the appellant is aggrieved by that decision, he has come to this Court on appeal.

From the evidence available on record, it is not in dispute that the appellant, who was trading as Kombe Building Material and the respondents knew each other very well. The parties had on two previous occasions entered into a contract whereby the appellant supplied cement blocks to the respondents on payment. It is the case for the appellant that the respondents partly paid the blocks supplied by the appellant leaving a balance of Tshs. 10,000,000/= which is yet to be settled and which is also the subject of the claim in the suit. As for the claim of Tshs. 36,000,000/= it is the appellant case that he had entered into a written contract for the supply of 60,000 cement blocks where the 3rd respondent through her directors the 1st and 2nd respondents undertook to pay Tshs. 36,000,000/= by 30/8/2004 vide (Exht P1). It is further the appellant case that in all transactions the mode of payment was that the respondents issued a post-dated cheque as a guarantee of payment. In case payment was not effected as agreed, the appellant (the drawee) of the cheque was entitled

to present the cheque to the respondents' bankers so that payment could be effected from their account. It is the appellant case that the respondents did not pay despite follow up. He thus presented the cheques for payment only to be returned with an endorsement "Account Dormant" (Exh P2) in respect of the claim of Tshs. 36,000,000/= and "Refer to drawer" (Exh P3) for Tshs. 10,000,000/=, hence the suit.

On the other hand, the 3rd respondent through her director the 1st respondent admitted to have issued postdated cheques tendered (Exh P2 & P3) but denied liability. He gave reasons. First he absolved the 2nd respondent from any liability as he was not one of the directors of the 3rd respondent. He mentioned the directors of the 3rd respondent as himself, Thabiti Salum Kalwani and Herman Mutungi. Second, he said he and the 3rd respondents were mere guarantors of the 2nd respondent and his company christened Trust Building Service Ltd had actually contracted with the appellant. But in his defence, the 2nd respondent denied to have ever been guaranted by any one either in his personal capacity or through his company. He also denied to have been involved in issuing dishonoured cheques tendered.

In this appeal, the appellant was represented by Mr. Julius Kalolo Bundala, learned counsel; Mr. Thomas Brash advocated for the 1st and 3rd respondents. The 2nd respondent did not enter appearance though duly served through Star Chambers Advocates. In terms of Rule 112 (2) of the Court of Appeal Rules, 2009 (the Rules), we decided to proceed with the hearing of the appeal.

Mr. Kalolo Bundala raised five grounds of appeal which can be condensed into two main grounds, namely:-

1. *The trial learned Judge erred in law in invoking standard of proof applicable in both civil and criminal cases – beyond reasonable doubt and on balance of probabilities – in doing so she failed to evaluate the evidence as a result she handed down a contradictory judgment.*
2. *The trial learned Judge erred in law when she ignored both the pleadings and evidence of appellant which supported his case.*

Arguing the first ground, Mr. Bundala said that the trial learned judge misdirected herself when she applied, in this case, standard of proof applicable in both civil and criminal cases. In so doing she failed to evaluate the evidence and arrived at a wrong decision. He went on to say

this being a civil matter, the burden of proof is on the balance of probabilities.

Responding, Mr. Brash in the first place said that it is true the burden of proof is on the balance of probabilities. In this case, he said the learned judge applied the standard as shown on pages 316-7 of the record. He did not say anything in connection to the complaint raised by Mr. Kalolo that the learned judge to have also applied the standard of proof normally applicable in criminal cases.

Pages 316-7 of the record of appeal which Mr. Brash referred us read as follows:-

> *"I have, I hope, amply demonstrated above that the Plaintiff herein, has failed to prove and satisfy the Court, on a balance of probabilities that, he indeed supplied 60,000 bricks to the Defendants. He failed to produce documents to show the deliveries if any.*
>
> *Now, back to the relief(s). In awarding relief(s), to a party, the general position is that, where injury has been pleaded and proved, the law must be able to provide a remedy to the injured*

party. In this particular case, the plaintiff has not ***been able to prove beyond reasonable doubt that*** *he suffered loss due from and owing to the defendants, on account of the dishonored cheques amounting to Tshs. 46.0 Million. Indeed, the plaintiff has failed to prove his case* ***on a balance of probabilities****".* [Emphasis supplied].

From the above extract it is clear that the learned judge applied the standard of proof applicable in civil as well as criminal matters. We need not cite any provision of law because this being a civil matter, it is elementary that the standard of proof is always on the balance of probabilities and not beyond reasonable doubt. Further, the two could neither co-existed nor applied interchangeably as was done in this case. The application of the aforestated standard of proof of both criminal and civil in this case is to say the least is novel and indeed puzzled us. We do not think the decision arrived at, in the circumstances, is sound in law. We entirely agree with the observation made by Mr. Kalolo. The first ground has merit.

We now turn to the second ground as to whether the finding of the trial court in dismissing the appellant's suit for insufficiency of evidence is proper.

Basically it is the submission of Mr. Kalolo that the trial learned judge did not evaluate the evidence of the appellant's case at all. Had she done so, she could have found the 3rd respondent through her directors (1st and 2nd respondents) to have entered into a contract with the appellant for the supply of cement blocks on payment for construction of a wall at Abdallah Twalipo JKT Mgulani Camp and that she failed to pay in respect of the claim of Tshs. 36,000,000/=. On presenting the cheque for payment which was issued as a guarantee, it was returned with an endorsement "Account Dormant", despite denial made by the 2nd respondent that he was not one of the directors of the 3rd respondent and so he was not the one who signed the cheque. Mr. Kalolo went further to say that there is evidence on record by Godfrey Felician (PW2) and Karim Kandota (PW3) the driver and turn boy of the lorry respectively who sent the blocks to the site which indicates that the 2nd respondent was the one who took delivery of the blocks at the site. He went on to say, the trial learned judge was wrong to rely on bare statement of denial of the 2nd respondent and demanded more

evidence from the appellant while there is ample evidence on record. In any case, he said, the respondents departed from their pleadings without making an application for leave to amend as is provided under O VI, Rule 7 of the Civil Procedure Code, Cap 33 R.E. 2002 (the CPC) as the 1st and 3rd respondents did not dispute to have issued cheques but they said they were mere guarantors; whereas the 2nd respondent disputed the claim in toto. The issue of short delivery of the blocks, for instance, is neither here nor there; it is not an issue, he charged.

Responding Mr. Brash submitted in a nutshell that the finding of the trial learned judge was correct. To underscore this assertion he said the appellant, for instance, failed in toto to prove whether the blocks were really supplied.

As indicated earlier on, the case of the appellant against the respondents jointly and severally, as pleaded, is based on two dishonoured cheques (Exh. P2 and P3). The 1st and 3rd respondents did not dispute at all to issue those cheques but maintained in the written statement of defence thus:-

2. *That the contents of paragraphs 4 and 5 of the plaint are disputed as 1st and 3rd Defendants were mere guarantors of the 2nd Defendant and his company (Traced (sic) Building Services Ltd) who had actually contracted with the Plaintiff.*
3. *The 1st and 3rd Defendants further states that as guarantors of the 2nd Defendant and his company (Traced Building Services Ltd) there was an understanding between all the parties that the manner in which the plaintiff was to be guaranteed was through post-dated cheques issued by the 3rd Defendant.*

On the other hand, the 2nd respondent as per paragraph 2, 4 and 5 of his written statement of defence denied to have been one of the directors of the 3rd respondents and to have also issued the cheques.

But in their oral testimonies, the respondents gave a different case altogether. For instance they denied to have received the cement blocks and stopped payment. Unfortunately, the trial learned judge accepted and considered that evidence. It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale

behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted that defence ought not to have been accorded any weight.

Whatever the position, the appellant replied to the written statement of defence by annexing an agreement of sale of cement blocks which later was tendered in court as Exht P1 without any objection. Exh P1 is a headed paper inscribed "General Services and Construction Co. Ltd" the name of the 3rd respondent and signed by the 1st and 2nd respondents as directors of the 3rd respondent. Indeed a business of a company is run by no other than her directors. So, the 1st and 2nd respondent (Exht P1) did that on behalf of the 3rd respondent. Once it is shown as in this case that the contract was reduced into writing then in terms of S. 101 of the Evidence Act, Cap 6 R.E. 2002 (the TEA), a party to such contract is not permitted to adduce oral evidence for the purpose of contradicting, varying, adding or subtracting from its terms. The section reads:-

> *101. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document,*

have been proved according to section 100, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representative in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms.

In view of the foregoing, therefore, the 2nd respondent is barred from adducing oral evidence for the purpose of subtracting that written contract. The 2nd respondent at the time cement blocks were taken he was one of the director of the 3rd respondent.

It is the evidence on record that the 1st and 2nd respondents knew very well the appellant as they had on previous occasions entered a contract of similar nature. We see no reason on the part of the appellant to cook a story against them. In actual fact if any supportive evidence is required in respect of the cement blocks sent to Abdallah Twalipo JKT Camp is the evidence of PW2 and PW3 who categorically stated to have sent the blocks there and the 2nd respondent was the one who received them. The learned judge did not consider that evidence at all.

In view of the clear evidence on record, the appellant has established his case on the standard required. We allow the appeal in that judgment is entered as prayed with costs.

It is so ordered.

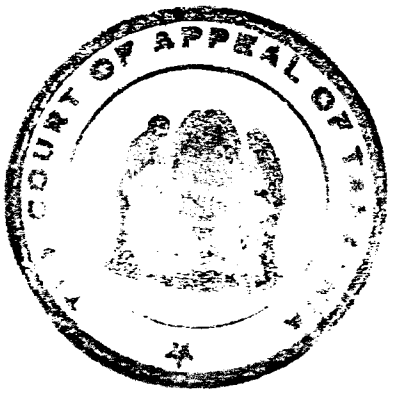
DATED at **DAR ES SALAAM** this 17th day of March, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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



A.H.MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL

cases including **Bushiri Hassan v Latifa Lukio Mashayo,** Civil Application No. 3 of 2007 (unreported) where it held as follows:

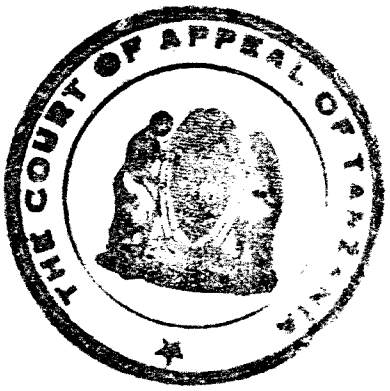
> *"...Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."*

In sum, I find that the Applicant has not shown any good cause for the Court to exercise its discretion to extend time. Accordingly, I dismiss the application in its entirety with costs.

DATED at DAR ES SALAAM this 8th day of March 2017.

G. A. M. NDIKA
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL