IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 185 OF 2018

AFRICARRIERS LIMITED.....APPELLANT

VERSUS

MILLENIUM LOGISTICS LIMITED.....RESPONDENT

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

(Mruma, J.)

dated the 23rd day of July, 2018
in
Commercial Case No. 131 of 2017

.....

JUDGMENT OF THE COURT

27th October & 16th November, 2021

FIKIRINI, J.A.:

The appellant, Africarriers Limited, in Commercial Case No. 131 of 2017, sued the respondent Millenium Logistics Limited for breach of contract and claimed the following reliefs: payment of USD 91,500.00 as the outstanding balance on the purchase price of the four Eicher trucks, and general damages to the tune of TZS. 200,000,000/=, at the bank interest rate of 25% plus the court interest rate of 12%, costs of the case, and any other reliefs deemed fit and just by the court. After the full trial, the court decided in favour of the respondent.

Aggrieved, the appellant filed this Civil Appeal No.185 of 2018 urging us to consider five grounds stated as follows:

1. *That, the trial judge erred in law and facts by making a judgment without confining his findings and or decision basing on the key issues raised by the court and the evidence adduced by the parties*
2. *That, the trial judge erred in law and facts by composing a judgment that does not reflect the testimonial of the plaintiff's witnesses.*
3. *That, the trial judge erred in law and facts for his material failure to properly analyze parties' testimonies.*
4. *That, the trial judge erred in law and facts by making a decision not based on fundamental principles required by the rules of evidence.*
5. *That, the trial judge erred in law generally In entering judgment for the respondent.*

We find it pertinent at this stage to recapitulate what transpired as the evidence adduced before the trial court. At the trial, the appellant (then plaintiff) summoned two witnesses, Nazir Ally Khalifan (PW1) and Mustafa Rashid (PW2), whose evidence were as per their witness statements filed on 18th December, 2017.

In his witness statement, PW2 stated that between July and August, 2015, the appellant and the respondent entered into a hire purchase

agreement for sale and purchase of four Eicher trucks with registration numbers T110 DEW, T110 DEV, TT100 DET, and T333 DER at the agreed price of USD 48,000.00 per truck and the total purchase price being USD. 192,000.00. The respondent made part payment, and trucks were handed over to the respondent on condition that the remaining balance was to be paid within ten months, at the monthly installment of USD 13,440.00, from 30th September, 2015 up to 30th June, 2016. By 30th June, 2016, there was an outstanding balance of USD 91,500.00. Failure to service the remaining balance on time would attract a 25% interest rate.

According to PW1 and PW2's evidence, the remaining unpaid balance, led to the suit before the Commercial Court as Commercial Case No. 131 of 2017.

In his witness statement filed on 30th November, 2017, Mr. Hasnein Salim Mohamed (DW1) concurred that there was a hire purchase of four trucks from the appellant; however, DW1 refuted the claim on the remaining unpaid balance. He contended that the respondent paid USD 192,000.00, the total purchase price. That by 30th May, 2016, the respondent had paid the initial payment of USD. 100,500.00, and after the issuance of demand notice, the respondent paid the balance of USD.91,500.00. And that due to existing trust between the parties, the

appellant did not issue the respondent all the receipts for the whole amount paid. After a full trial the trial court decided in favour of the respondent.

As stated earlier, the decision did not amuse the appellant; consequently, on 14th August, 2018, the appellant lodged a notice of appeal followed by a memorandum of appeal. According to Rule 106 (1) and (2) (a), (b), (c), and (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules), written submissions were duly filed. Through the counsel, the appellant filed her submission on 11th December, 2018, and the respondent, in terms of Rule 106 (7) of the Rules, did so on 18th January, 2021.

At the hearing on 27th October, 2021, Mr. Ngassa Ganja Mboje, learned counsel, appeared representing the appellant, whereas the respondent enjoyed the services of Mr. Nickson Ludovick, learned counsel. After adopting their filed submissions, both learned counsel took the liberty to expound orally and answer the contents in their written submissions in support of their positions regarding the appeal.

Mr. Mboje admitted that there is no dispute on the purchase of the four trucks. Yet he challenged the decision, contending that after the judge had answered the first issue in the affirmative, that there was verbal

agreement on the sale and purchase of trucks, the next issue for determination ought to have been "whether the respondent paid for all the four trucks in full." He thus urged us to consider the issue not answered in the affirmative as the respondent never proved payment of the outstanding balance. Referring us to page 57 of the record of appeal, he submitted that aside from exhibit D1 comprising payment receipts for payments made in January and February, 2017, there was no evidence that the respondent paid the whole amount. Based on the evidence tendered in court, particularly at page 95, he argued that the proof is that by 30th May, 2016, USD 100,500.00 was the only amount paid. Therefore, according to him the judge should have confined himself to the fact that payments made were only those paid before issuing the demand notice. Supporting his stance, he referred us to the case of **Blair v Polland and Morris,** (1930) 1 K.B 682, in which the court held that:

"Cases must be decided on the issues on the record."

Mr. Mboje also argued that PW2's testimony wrongly recorded the outstanding balance was around USD 92,000.00 instead of USD 91,500.00. As a result of variance in the amount, as reflected at page 120 of the record of appeal, the trial judge concluded that there was a contradiction.

Taking upon the case of **Tatu Mohamed v Maua Mohamed,** Civil Appeal No. 31 of 2000 (unreported) cited by the counsel for the respondent in his submission, Mr. Mboje contended that **Tatu's** case is distinguishable based on its circumstances. In that case, the proof of acquisition of the property was an issue, and the Court wanted that proof, whereas in the present case, the respondent was required to ascertain "whether the respondent paid for all the four trucks." There was no evidence disproving the outstanding balance from the respondent's account, Mr. Mboje submitted.

Furthering his submission, he argued that the burden of proof in a civil case lies with the one who alleges. Bolstering his submission, he referred us to the case of **Nurdin Bandali v Lambak (Tanganyika) Ltd** (1963) E.A. 304; and also to the case of **Credit Finance Corporation Ltd v Harcharan Singh Rambutta** (1961) E.A. 231, on the status of the buyer in the hire purchase agreement. The decision in both cases was that ownership could only pass after payment of all the installments.

Probed by us on what evidence he found was not considered, Mr. Mboje responded that the judge failed to award the relief sought by the appellant even after the respondent had failed to prove payment of all the installments. Instead, the judge weighed on slight errors that were not

fundamental to arrive at his decision, referring us to page 99 of the record of appeal, he argued that it made the appellant interpret the judge's decision as not to have pondered on the evidence presented before the court by her witnesses. He thus urged us to allow the appeal and set aside the trial court's decision or, in the alternative, intervene under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 and invoke revisionary powers vested on us. He urged us to take inspiration on the statement at page 19 of the decision in the case **Nazira Kamru v MIC Tanzania Ltd**, Civil Appeal No. 111 of 2015 (unreported).

In reply, Mr. Nickson argued that the judge's findings correctly evaluated the evidence in response to the submission. *First*, he wanted to know if the claimed outstanding amount existed, as shown on pages 114-115. *Second*, on the submission that the respondents had to confirm whether the respondent paid the total amount, Mr. Nickson castigated the averment, contending that the judge reviewed the plaint and evidence and concluded that the transaction was on trucks and not buses. All these brought the judge to conclude that the appellant failed to prove the claims before the court. Mr. Nickson criticized the submission that the respondent did not pay the total amount or had an outstanding balance, arguing that the submission is contrary to the legal principle that who alleges must

prove, referring to us PW1's evidence at page 115, admitting that there was no issuance of receipts to the respondent. He concluded that it was thus not easy for the judge to presume that the respondent had an outstanding balance without receipts.

Submitting on **Tatu's** case (supra), Mr. Nickson argued both orally and in the submissions filed that the High Court judge relied on the law of evidence, mainly sections 110 (1) and (2), 111 and 112 of the Evidence Act, Cap. 6 R.E. 2002 (the Evidence Act), on who has the duty of proving a claim and that the plaint was dismissed based on the adduced evidence. He contended that, even though some payments had receipts, and some did not, still, the respondent successfully proved there was no outstanding balance because, as reflected at pages 94, 113, and 114 of the record of appeal, the appellant did not dispute that. Also when PW1, was cross-examined, he admitted not knowing the exact claimed outstanding amount and admitted that some payments receipts were not issued. Mr. Nickson argued that since the appellant admitted facts grounding the claims, there was no need for more proof. Thus, he wondered how the trial court could have awarded the appellant while there was no evidence of unpaid balance. Mr. Nickson also referred us to the case of the **Attorney General**

and 2 Others v Eligi Edward Massawe and 104 Others, Civil Appeal No. 86 of 2002 (unreported).

Examining the case of **Nazira** (supra), Mr. Nickson distinguished it submitting that what is before the Court is different from what the appellant seeks. On the above submission, he urged us to dismiss the appeal.

Rejoining and submitting on the disputed amount, Mr. Mboje referred us to paragraph 6 of the plaint in which the claimed amount is USD. 91,500.00. He further submitted the claim and undisputed evidence is that the respondent admitted paying upon being issued with demand notice.

As for the receipt issuance, Mr. Mboje directed us to pages 117 and 120, that upon payment, the cashier issued receipts. Maintaining his position, he contended that after the appellant had established a balance due, it was not proper for the trial judge to disregard the prayer that the appellant deserved payment. That is why the appellant considers the evidence was not properly analyzed and evaluated.

On the strength of his submission, he prayed the appeal to be allowed with costs.

In light of the foregoing rival arguments from the learned counsel for either side, what stands for our deliberation and determination, is whether the appeal before us is merited. To begin with, we find it relevant to revisit the framed issues, as that seems to be the genesis of this appeal. It is evident from page 112 of the record of appeal that on 5th February, 2018, the court framed three issues, namely:

1. *Whether there were any sale agreement between parties.*
2. *If the answer to the first issue is in affirmative, then whether or not the defendant has paid all the amount due to the plaintiff.*
3. *To what reliefs are the parties entitled.*

The 1st, 2ndand 3rd complaints are that the trial judge erred in law and facts by making a judgment without confining his findings and or decision on the key issues raised by the court and evidence adduced by the parties. To begin with, we are aware of the settled position that the court is obliged to decide on each and every issue framed in making its decision. See: **Kukal Properties Development Ltd v Maloo & Others** (1990-1994) E.A. 281.

Coming to the appeal before us, from the evidence on record as well as submissions by the counsel, there is no dispute that there was a sale and purchase of four Eicher trucks as reflected in paragraph 4 of the plaint. Similarly, there was another agreement referred to in paragraph 3 on the

purchase of six Golden Dragon buses. And as gathered from the plaint and evidence, there is no written contract entered. It is, therefore, not clear the terms and conditions stated referred to which agreement. The judge, in his decision, as indicated at page 93, relied on witness statements and cross-examination to establish a verbal contract between the parties and terms and conditions in the absence of any written contract. And, based on the evidence adduced, he answered the first issue in the affirmative that there was a sale agreement between the parties to purchase four trucks. After answering the first issue, he thus embarked on the next issue.

The second issue was whether the defendant paid for all four trucks bought from the plaintiff. We find this issue answered at pages 98-99 of the record of appeal. The judge analyzed and evaluated the evidence adduced, pointing out contradictions in the pleadings and the adduced evidence. The judge concluded that the appellant did not prove her case on the balance of probabilities, the standard required in proving a civil case. The above position, which we relate to, has been well articulated in our previous decision in the case of **Abdul Karim Haji v Raymond Nchimbi Alois and Another,** Civil Appeal No. 99 of 2014 (unreported), in which we held that:

> *".....It is an elementary principle that he who alleges is the one responsible to prove his allegation."*

Now applying that to the present appeal, we have painstakingly examined the record of appeal and conclude that the judge analyzed and evaluated the evidence based on the principles of evidence that the one who alleges must prove, and concluded that the appellant failed to prove her case. The area closely examined was on the existing contradictions. *First,* he looked at paragraph 3 of the plaint in which the appellant claimed the agreement was for six golden buses, whereas the evidence furnished before the court was about four trucks. *Second,* the judge found a contradiction in the four trucks purchase price. He could not tell whether the purchase price was USD 192,000.00, which is USD. 48,000.00 per each truck or USD. 201, 600.00 as averred in paragraph 5 of the plaint. *Third,* although the judge treated PW1's stated balance due of USD. 91,500.00 which differed from that of PW2 of USD. 91,500.00, but must have considered all the contradictions collectively. The outcome should have impacted the decision.

Contradictions that go to the root of the matter blemish the evidence and taint the witness's credibility. See: **Ernest Sebastian Mbele v Sebastian Sebastian Mbele and 2 Others**, Civil Appeal No. 66 of 2019.

In his submission Mr. Mboje when addressing us on the fact that the judge decided without confining his findings and or decision by basing on the key issues raised by the court and the evidence adduced by the parties, referred us to the case of **Blair** (supra). While we agree on the principle, we do not agree with his submission that the judge made his decision without answering the framed issues. Our above illustration shows how the judge analyzed and evaluated the evidence and decided that the appellant failed to prove her claim. Thus, we find ourselves concurring with Mr. Nickson's position elucidated in **Tatu's** case, on who has a duty to prove a claim.

Mr. Mboje, after denouncing the decision in **Tatu's** case, the stance we do not share, he invited us to be inspired by **Nazira's** case decision (supra). Concerning Mr. Mboje's position, we find the facts in Nazira's case distinguishable from the facts in the present appeal. In **Nazira's** case, the evidence had not been analyzed and evaluated by the court, which is not the case presently.

Given the above scrutiny, we find that the 1st, 2nd, and 3rd grounds are devoid of merit and consequently dismiss them.

On the 4th ground, the appellant criticized the judge's decision for not observing the fundamental principles of the rules of evidence. As pointed out earlier in this judgment, in civil litigation, the burden of proof to be discharged on the balance of probabilities lies with the one who alleges. Section 112 of the Evidence Act, provides as follows:

> *"The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."*

Besides the cited provision, there are several cases in that regard, such as **Abdul Karim** (supra), **Pauline Samson Ndawavya v Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017, and **Anthony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 (both unreported), to mention a few. In the latter case, we 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 of Evidence Act, Cap. 6 Revised Edition, 2002."

The judge applied the same principle when at page 99 of the record of appeal demonstrated as follows:-

"The plaintiff though claiming that she is entiled to unpaid purchase price for the Eicher trucks there is no proof that there was any unpaid purchase price for the four trucks. There is no shred of evidence to prove various claims made by the plaintiff. All her claims must fail."

This conclusion, in our view, is undeniably derived from the evidence adduced before the court, starting with DW1's witness statement found at page 35, acknowledging that the respondent bought four trucks from the appellant. The total purchase price was USD 192,000.00 for the four trucks. However, due to the existing trust between the parties, no receipts were issued in some transactions. The acknowledgment that the payment was received was, in some instances, by telephone. Despite the claim by PW2, as reflected at page 120, that the receipts were issued and copies remained with the appellant, no copies were tendered to substantiate the appellant's claim.

From all fours, the appellant's assertion leaves the respondent's statement unchallenged on the payment of the remaining balance even though no receipts were issued. It was not the respondent's duty to prove payment of the outstanding balance of USD.91,500.00, albeit on the balance of probabilities, but the appellant's.

We are of the considered view that the appellant appeal is devoid of merit, and we entirely dismiss it with costs.

Order accordingly.

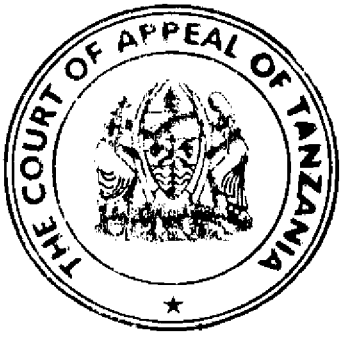
DATED at **DAR ES SALAAM** this 15th day of November, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The judgment delivered this 16th day of November, 2021 in the presence of Ms. Mboresia John, learned counsel for the appellant and Mr. Ludovick Nickson, learned counsel for the respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL