IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MASOUD, J.A.)

CIVIL APPEAL NO. 509 OF 2020

ELIAS B. RAMIN AND COMPANY LIMITED..... APPELLANT

VERSUS

D.B. SHAPRIYA & CO. LIMITED ..... RESPONDENT

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

(Fikirini, J.)

Dated the 21st day of April, 2020

in

Commercial Case No. 55 of 2017

JUDGMENT OF THE COURT

12th July & 29th November, 2023

WAMBALI, J.A.:

This appeal arises from the decision of the High Court of Tanzania, Commercial Division (the trial court) in which Commercial Case No. 55 of 2017 lodged by the appellant against the respondent was dismissed in its entirety with costs. Briefly, in the amended plaint, the appellant averred that sometimes in 2013, she entered into business agreement with the respondent for supply of cement to its Biogas Site in Mtwara. Following the said agreement, the appellant supplied to the respondent 13, 885 bags of cement worthy TZS. 243,081,500.00 whose transport costed TZS.

6,796,000,00 from Dar es Salaam to Mtwara site. It was further pleaded that despite several demands from the appellant, the respondent neglected or refused to pay the outstanding amount though she acknowledged being indebted through a letter dated 4th August, 2016. Moreover, the said outstanding amount was not settled up to the date the appellant filed the suit (Commercial Case No. 55 of 2017) before the High Court whose decision is the subject of the instant appeal. Basically, at the High Court, the appellant prayed for a declaration that: it was entitled to the payment from the respondent of the outstanding amount for the cement supplied plus transport costs stated above; TZS. 100,000,000.00 as damage for losses associated with the delay in payment of the outstanding amount; interests and costs of the suit.

In her written statement of defence, though the respondent stated that there was an understanding between the parties on the supply of cement, she refuted the claim on the contention that the appellant failed to fulfil its obligation on time as agreed and thus she never supplied cement. The respondent further showered blame on the appellant for the alleged failure to address on time the anomalies raised out of discharging its duties under the said business agreement. Besides, the respondent averred that the alleged acknowledgment of the indebtedness was subject

to the fulfilment of the obligation assigned to the parties during the round table negotiations and that the same could not materialize due to the appellant's failure in discharging its obligation.

During the trial, the appellant's claims were supported by its Managing Director, Elias B. Ramin (PW1) who lodged a witness statement in terms of rule 48 (2) of the High Court (Commercial Division) Rules, 2012, GN. No. 250 of 2012 (the Commercial Division Rules) as amended by GN. No. 107 of 2019. PW1 also appeared for cross-examination and successfully tendered two documentary evidence which were admitted as exhibits P1 and P2.

However, an attempt by PW1 to tender the statement of accounts as an exhibit to substantiate the appellant's claims was in vain because it confronted an objection from the respondent which was sustained by the trial judge. Moreover, the witness statement affirmed by Hassan Saudi Masengwa, the Operations Manager who was intended to be the second witness for the appellant was struck out by the trial judge in terms of rule 56 (2) of the Commercial Division Rules, for failure to appear and avail himself for cross examination.

On the other hand, the respondent's defence was supported by two witnesses, namely Dipackumar Kotak (DW1), the Executive Director and

Lewis Saha Mcharo (DW2), the Human Resource and Administration Manager. No exhibit was tendered by the said witnesses.

The trial court framed and recorded three issues which were agreed upon by the parties, to wit: one, whether the appellant failed to fulfill its obligation against the respondent and to what extent, if any; two, whether the respondent was liable to pay the appellant the sum of TZS. 243,051,000.00 and TZS 6,726,000.00; and three, what were the reliefs of the parties. At the climax of the trial, it was found by the trial judge that the appellant had failed to prove its case on the balance of probabilities. Consequently, the suit was dismissed with costs as intimated earlier on.

The appellant has contested the judgment and decree of the High Court through a memorandum of appeal on four grounds thus:

> "1. *The trial court erred in law in holding that exhibit P-1 was not sufficient proof of existence of contract for the supply of cement, and subsequent acknowledgment of liability arising therefrom by the respondent.*
>
> 2. *The trial court erred in rejecting the sworn statement of PW2 Hassan Saudi Masengwa while the High Court (Commercial Division)*

Procedure (Amendment) Rules 2019 permitted such admission despite the lack of cross – examination which the court is entitled to weigh only during trial analysis of evidence.

3. *The trial court erred in rejecting the applicant's Statement of Accounts that showed in detail the parameters of supply of cement between the parties.*

4. *The trial court erred in its evaluation of evidence, thereby arriving at an erroneous conclusion of supply of cement."*

At the hearing of the appeal, Mr. Peter Kibatala and Mr. Roman S. L. Masumbuko, both learned advocates, appeared for the appellant and respondent respectively. Both counsel urged the Court to consider the parties' written submissions lodged in Court earlier on to support their respective positions in this appeal and made brief oral submissions.

In determining the appeal, we propose to start by considering the second and third grounds separately and conclude with the first and fourth grounds conjointly.

It was argued for the appellant by Mr. Kibatala that the trial judge wrongly struck out the witness statement of Hassan Saudi Masengwa

because of his failure to appear for cross-examination. It was further submitted that according to the record of appeal, the said witness had appeared before the trial court several times for cross-examination, but the hearing was adjourned due to the absence of the respondent's counsel, for instance on 27th August, 2019. In the learned counsel's view, the trial judge would have considered the witness's previous appearance as among the exceptional reason, exercised her discretion and thereby admitted the said statement in terms of rule 56 (2) of the Commercial Division Rules and accorded it less weight as per rule 56 (3) of the same Rules instead of striking it out. In this regard, Mr. Kibatala urged us to allow the second ground of appeal.

In reply, Mr. Masumbuko argued that in terms of rule 56 (1) of the Commercial Division Rules, there is a precondition that a party who intends to rely on a witness statement must avail him for cross-examination. That, the trial judge correctly, in terms of rule 56 (2) of the Commercial Division Rules, struck out Hassan Saudi Masengwa's statement because he did not appear at the trial. He maintained that the trial judge could not have exercised the discretion under rule 56 (2) of the Commercial Division Rules, because there were no exceptional reasons advanced by the appellant for the witness's failure to appear for cross-

examination. He submitted that, the appellant argument at the trial that the whereabouts of the said witness was unknown despite the efforts which were made to trace him lacked sufficient explanation. In his view, it was only the appellant's affidavit explaining the absence of the witness that would have convinced the trial judge to exercise her discretion to admit the statement. In the circumstances, Mr. Masumbuko pressed us to dismiss the second ground.

According to the record of appeal, the decision of the trial judge to strike out the witness statement of Hassan Saudi Masengwa was influenced by the fact that, on the respective date, that is, 2nd March, 2020, the appellant's counsel had failed to offer plausible reasons for the witness's absence. It was therefore the trial judge's finding that, she could not exercise her discretion to admit the said witness statement because mere words without an affidavit of the appellant on the alleged failure to trace him were not sufficient.

Our careful perusal of the record of appeal indicates without doubt that, before the respective date, the said witness had appeared before the trial court twice; on 20th June, 2019 and 27th August, 2019 for cross-examination. On the first occasion, hearing was adjourned because the counsel for the respondent had been assigned a criminal case to represent

one of the parties (the accused). On the second occasion, hearing was adjourned because the respondent's counsel was absent and the counsel who appeared on his behalf was not conversant with the case because it was Mr. Masumbuko who had been instructed to represent the respondent after the previous counsel withdrew. Thus, hearing was adjourned to another date and the respondent was ordered to bear costs.

In the circumstances, we are of the view that, in deciding the fate of the witness statement in accordance with the law, even in the absence of the appellant's affidavit, the trial judge would have taken into consideration the fact that though the witness's whereabouts was unknown, he had previously appeared twice for cross examination in response to the court summons. Moreover, since it is not disputed that in the two occasions hearing of the case was adjourned because of the inability and absence of the respondent's counsel respectively, the trial judge would have judiciously exercised her discretion and admitted the said witness statement under rule 56 (2) of the Commercial Division Rules and later accorded it less weight as provided under rule 56 (3) of the same Rules. For clarity, rule 56 (2) and (3) state:

> *"56 (2) Where the witness fails to appear for cross examination, the court shall strike his witness*

statement from the record, unless the court is satisfied that there are exceptional reasons for the witness's failure to appear.

(3) Where the court admits a witness statement who had failed to appear for cross-examination, lesser wait shall be attached to such statement".

We are alive to the position that the Court rarely interferes with the discretion of the trial judge, like the one prescribed under rule 56 (2) of the Commercial Division Rules, unless it is demonstrated that the discretion was not exercised judiciously based on the facts and the law. In **Mwita Mhere v. The Republic** [2005] T.L.R. 107, the Court stated as follows on the import of judicial discretion:

"Judicial discretion is the exercise of judgment by a judge or court based on what is fair, under the circumstances and guided by the rules and principles of law and the court has to demonstrate however briefly how the discretion has been exercised to reach the decision it takes."

In the case at hand, considering the circumstances discussed above with regard to the previous attendance of the said witness, we are respectfully of the view that the trial judge's discretion was not exercised judiciously. Thus, we interfere with the trial judge's discretion and order that the witness statement of Hassan Saudi Masengwa be admitted under

rule 56 (2) and shall be dealt with in terms of rule 56 (3) of the Commercial Division Rules during consideration of the grounds of appeal on evaluation of evidence. Consequently, we allow the second ground of appeal.

Submitting in support of the third ground of appeal, Mr. Kibatala criticized the trial judge for rejecting what he called a very vital document, that is, the statement of accounts which indicated in detail the extent of supply of cement by the appellant to the respondent. He argued that the rejection was notwithstanding the fact that the document had fully complied with electronic evidence rules, including being duly accompanied by certification. In his view, the matters raised by the trial judge to the effect that the document had to bear stamps and signatures are not admissibility issues or judicial requirement by way of decided case law. On the contrary, he submitted, those issues could be resolved through cross-examination and being accorded the requisite weight by the trial judge during evaluation of evidence. He emphasized that the finding that the document lacked the name of those who prepared it was wrong and a clear misdirection on the part of the trial judge and could not have constituted the ground of rejecting such a vital document.

The learned counsel also criticized the trial judge's reasoning that there were remarkable differences on the annotations between the

original and the copy of the statement of accounts annexed to the witness's statement. In this regard, he contended that, the trial judge's approach was a total misdirection because: one, the approach of the Commercial Division has always been to compare the contents of the documents and not trivial matters like annotations or otherwise; and two, such differences, if any, fell into the domain of cross-examination. However, Mr. Kibatala did not provide the Court with any provision of law or decision of the Commercial Division or this Court to support his assertion.

On the other hand, the learned advocate maintained that the provisions of section 39 (1) and (2) of the Companies Act, Cap. 212 [R.E.2019] (the Companies Act) cannot apply in the circumstances of this case as the authenticity of the document was beyond controversy. He concluded his submission by urging the Court to allow the third ground of appeal because the admission of the wrongly rejected document would have made the appellant's case to have been proved on balance of probabilities.

Responding, Mr. Masumbuko forcefully supported the finding of the trial judge when she rejected the said document because, in his view, it was not authentic and that the remarkable annotations dented its

genuineness. For his part, the first thing was for the trial judge to determine the admissibility of the document before the witness (PW1) was cross-examined on its contents or considered it and accorded the appropriate weight during evaluation of evidence. He contended that the document which was rejected had nothing to show the connection of the appellant's claim that it supplied the cement to the respondent and the associated value, since its authenticity was questionable. He added that as found by the trial judge, the document did not also comply with the provisions of section 39 (1) and (2) of the Companies Act as it lacked the affidavit of authenticity since it was an electronic document. Mr. Masumbuko submitted further that the appellant's counsel argument on the requirement of the law and the alleged practice of the Commercial Division of the High Court was not backed by any decided case to convince the Court to hold otherwise. He thus implored the Court to dismiss the third ground of appeal.

It is noted that the trial judge heard arguments of the parties on the objection against the admission of the disputed statement of accounts and in the end, she sustained it. In rejecting the admission of the document the trial judge reasoned thus:

"I will give a benefit of doubt to Mr. Msemo's submission on what exactly transpired on 1st November, 2018 though in the absence of any information on the record. However, even with that in place, the document intended to be tendered is lacking in so many ways such that even the suggestion that by way of cross-examination all the intended to be answered questions will be asked and answered once, ...because one, it is simple piece of information not known where it was generated from. As a company there must be stamps and signature of the one who prepared the document, this one does not have. Instead, it has the Law Firm styled as Tan Africa Law Chambers that stamp does not mean anything since the document is not theirs neither is the signature of their clerk. Second, it is purported that the document was prepared jointly by the plaintiff's employee and that of the defendant's.

The document intended to be tendered has no names or signatures of those who prepared it.

So it lacks authenticity if I go by that statement. Three, the purported to be original is annotated while the copies accompanying witness's statement is not. The counsel has blamed it on

photocopy machine, the excuse which I do not take lightly. I say this premised on the fact that the counsel is quite aware that copies are created from originals, for them to be valid or reliable, so he was expected to be careful when preparing the copies, so that they can exactly reflect to have been generated from the original copy about to be tendered.

Four, this being company's documents compliance of section 39 (1) and (2) of the Companies Act was necessary at least for the document to have signature of PW1 who is the Managing Director and the Company's stamp or seal. This document has nothing. One of the criteria to admit document is authenticity which this one lacks.

In the light of the above stated reason, I reject admission of this document, notwithstanding the overriding principle, I was invited to invoke. Overriding principle caters both ways so in order for the principle to be applicable there was to be an imminent situation which if not applied will hamper justice. Laxity, sloppiness cannot be by any standard be entertained under the refuge of the overriding objectives. I thus uphold the objection raised and reject admission of the document".

We have closely scrutinized and examined the disputed statement of accounts which was attached to the amended plaint and PW1's witness statement through paragraphs 7 and 14 as TAL-3 respectively against the backdrop of the reasoning of the trial judge when she rejected its being admitted in evidence. We entirely agree with the matters raised by the trial judge, more particularly on its authenticity. We wish to note that unfortunately, even in his witness statement, PW1, through paragraph 14 did not lay a foundation of how the said statement came into being to assist the trial court to have reached a contrary decision to admit it. Indeed, if it was prepared by his company, compliance with section 39 (2) of the Companies Act was necessary by showing the company logo, signature and seal to ensure its authenticity. Besides, even if the said document was prepared jointly by the officers of the appellant and respondent as stated by PW1 during cross-examination, the identity of the respective companies had to be clearly shown by their common seal in compliance with said section. To be specific, section 39 (1) and (2) of the Companies Act, provides:

> *"(1) A document is executed by a company by the affixing of its common seal. A company need not have a common seal, however, and*

the following subsections apply whether it does or not.

(2) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company."

In the event, since the parties were given a right to be heard on the authenticity of the alleged statement of accounts, we do not have any justification to interfere with the trial judge's finding and her decision of not admitting it because it was wanting in so many ways and did not comply with the requirement of the law. We are alive of the fact that according to the record of appeal, in the trial judge's ruling on the preliminary objection, she gave the benefit of doubts to Mr. Msemo's arguments on what transpired on 1st November, 2018 leading to the filling of an affidavit by PW1 in support of the statement of accounts. Equally, we take note of the fact that the ruling of the trial judge on that matter has not been contested by the respondent through an appeal. However, we are of the view that the authenticity of the said statement of accounts is still questionable in view of the anomalies pointed out above. In the result, we dismiss the third ground of appeal.

The epicenter of the appellant's complaints in the first and fourth grounds of appeal are that it was an error for the trial judge to have concluded that exhibit P1 did not constitute sufficient proof of existence of the contract for the supply of cement to the respondent and her failure to evaluate evidence on the record as a whole. It was submitted by Mr. Kibatala that had the trial judge considered exhibits P1 and P2 together with paragraphs 4 and 5 of the respondent's amended written statement of defence, she would have come to the finding that the appellant proved the case against the respondent on balance of probabilities. He argued further that during cross-examination, DW1 admitted the veracity of exhibit P2 and thus the trial judge would have taken the statement as an admission of the existence of a debt for the supplied cement. He criticized the trial judge's statement with regard to exhibit P2 that the said letter might have been related to other business transaction between the parties and not in respect of the outstanding amount for supply of cement reflected in exhibit P1. He termed the statement as speculative and inquisitorial for not being backed by the evidence on record. Indeed, he argued that the trial judge's insistence on lack of local purchase orders (LPOs), receipts and vehicle registration numbers led her to lose track of the fact that the business arrangement between the parties was

established over time such that according to the evidence on record, the orders were made orally. Relying in the decision in the case of **Merali Hirji and Sons v. General Tyre (E.A.) Limited** [1983] T.L.R.173, Mr. Kibatala argued that oral contract are recognized in Tanzania and that they can also be deduced from conduct of the parties over a period of time.

The learned advocate concluded his submission by emphasizing that had the trial judge properly evaluated the evidence on the record as a whole, she would have come to a finding that the appellant proved the claims against the respondent to the required standard. He therefore pressed the Court to allow the first and fourth grounds of appeal.

Mr. Masumbuko contested Mr. Kibatala's arguments and submitted that exhibit P1 which contains a collection of demand notices of different dates on the alleged outstanding amount of TZS. 243,081,500.00 for supply of cement and TZS. 6,796,000.00 as transport costs, could not have constituted sufficient proof on the existence of the contract in which a total of 13,885 bags of cement were supplied by the appellant to the respondent. He added that the said demand notices were not supported by tax invoices and delivery notes or any other documents. In his submission, even if exhibit P1 is to be jointly considered with exhibit P2

as contended by Mr. Kibatala, still the appellant's case would not be proved. Besides, he maintained that the averment in paragraphs 4 and 5 of the respondent's amended written statement of defence are mere allegation and cannot constitute proof that she acknowledged that she was liable for the outstanding amount. He added that there is nowhere in the record of appeal that DW1 admitted to the existence of the debt during cross- examination because the said statement did not show the outstanding amount claimed by the appellant.

Mr. Masumbuko, therefore, supported the trial judge's finding that the appellant failed to prove the case by discharging the burden as required by the provisions of sections 110 and 111 of the Evidence Act Cap. 6 R.E. 2022 which state as follows:

> *"Section 110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts must prove that those facts exist.*
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
> *Section 111-The burden of proof in civil proceedings lies on that person who would fail if no evidence at all were given on their side."*

To support his stance, he made reference to the decision of Lord Hoffman in the case of **In re B (children)** [2009] I AC 11 and that of the Court in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha**, (Civil Appeal No. 45 of 2017) [2018] TZCA 218 (11 October 2018, TANZLII). He maintained that the appellant could not prove supply of cement to the respondent through exhibits P1 and P2 without producing invoices and delivery notes to show how the contract was performed. Finally, he urged us to find that the first and fourth grounds lack merit and ultimately dismiss the appeal with costs.

It is settled that this being the first appeal from the High Court in its original jurisdiction, it is in a form of rehearing and therefore, the Court has the power, in terms of rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009, to re-appraise the evidence and draw inferences of facts. Indeed, the Court can only interfere with the finding of facts by a trial court where it is satisfied that it has misapprehended the evidence in such a manner as to make it clear that its conclusion is based on incorrect premises (see **Salum Bungu v. Mariam Kibwana,** Civil Appeal No. 29 of 1992 (unreported).

On the other hand, it is also settled that where the trial court wrongly rejects certain evidence, it is the duty of the first appellate court

to arrive at its own conclusion upon a consideration of the evidence as a whole properly admissible and available on the record. For this stance, see **Kulwa Kabizi, Paulo Sindano Balele and Suleiman Mlela v. The Republic** (1994) T.L.R. 210, among others.

In view of the decision we have reached with regard to the second ground in which we have restored the witness statement of Hassan Saudi Masengwa, we will consider his evidence as PW2 along with the available evidence on the record of PW1, DW1 and DW2 during the re-appraisal of the evidence.

It is elementary that in a suit based on contract be it oral or written, a party must show that such an agreement existed and that it was breached by the other side resulting in the loss to entitle him to the claim of damages. In this regard, Sir P.C. Mogha, in the book, **The Principles of Pleadings India,** 14th Edition at page 269 states:

> *"In a suit brought on a contract, the contract must first be alleged, and then its breach and then the damages. The actual contract which was inforce between the parties should alone be alleged."*

Moreover, in civil cases, the standard of proof is on a balance of probabilities and thus, the trial court would only sustain a party's evidence which is more credible than the other on a particular fact which is required

to be proved. To this end, Sarkar's Law of Evidence, by S.C. Sarkar and P.C. Sarkar, Lexus Nexis at page 1896 states:

> *"... the burden of proving a fact rests on the part who substantially asserts the affirmative of the issue and not upon the one who denies it; for negative is usually incapable of proof. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reason...until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party."*

Emphasizing on the requirement of proof on balance of probabilities, in **Miller v. Minister of Pensions** [1937] 2 ALL. ER. 372, Lord Denning stated:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefits of the doubts. This means that the case must be*

decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say we think it is more probable than not, but if the probabilities are equal, it is not ..."

In the case at hand, the appellant, through PW1, throughout the trial consistently maintained that there was oral contract between the parties in which 13,885 bags of cement were supplied to the respondent in the year 2013 but the appellant was not paid the outstanding amount plus transportation costs stated above.

However, the respondent maintained that the appellant gave no cogent evidence on how the agreement was reached, how the transaction was carried out and the exact period in which the said contract was executed. On the contrary, it was submitted that the appellant simply stated that the agreement was reached in 2013 and cement supplied on the same year without further particulars.

We agree that there was need for further evidence to prove the appellant's claim. It is plain that though PW1 stated that the supply of

cement started immediately after the alleged oral agreement was entered, he did not support his assertion with any evidence like delivery notes as reasoned by the trial judge. It is not known why there was no supporting documents, such as delivery notes among others for such a huge consignment of bags of cement, that is, 13,885 bags. On the other hand, PW1 in paragraph 18 of the witness statement stated that before the dispute that led to the institution of the case at the High Court, the respondent had been supplied with 50,000 bags of cement which were duly paid for and that it was not disputed by the other side. However, there is no further evidence on whether the agreed modality of supply and payment of the previous consignment was the same as that involving 13,885 bags of cement. It is further noted that, PW2 stated in paragraph 8 of his witness statement that the delivery of the orders for unpaid supply was done as per the previous orders which were paid. According to PW2, the supply of the 13,885 bags of cement was the last order. However, no further explanation was given on whether the respondent made an oral order for the supply of the said bags of cement at once or otherwise. Unfortunately, the facts stated by PW2 on this issue were not stated by PW1.

It is noted that, in her judgment, the trial judge stated that in order for the appellant to prove that she fulfilled her obligation as agreed in the stated oral agreement, she was supposed to show the following: one, the existence of an order from her to the respondent; two, receipts from purchase of cement from Twiga Cement Factory as averred in the pleadings; three, provide a list and truck registration numbers which transported the cement, the amount, date, possibly driver's names and the gate pass from the point of collection to the respondent's site; four, delivery notes from the respondent site; and five, invoices raised based on the order and delivery notes.

We further note that in the course of the judgment, the trial judge found that none of the above stated conditions were fulfilled as nothing was produced as exhibits at the trial to substantiate performance and entitlement to the claim apart from exhibits P1 and P2. Particularly, the trial judge reasoned as follows:

> *"In the present suit, the court was not availed with any evidence in that respect nor was it appraised on how the figures TZS. 243,081,500/= for costs of the cement and TZS. 6,796,000/= for transport was arrived at. The mode of payment was equally important to be agreed on, which there was no*

such evidence led to indicate what was agreed between the parties. The agreement, even though oral, but did not stop the parties to agree on these basic terms and conditions.

Despite insisting of supplying and delivering to the defendant's site 13,885 bags of cement, but without proof of the order by the defendant or a copy of the purchase receipt which its original could have been issued to the defendant, or delivery notes acknowledged receiving of the cement by the defendant or invoice notes raised in that regard by the plaintiff, the plaintiff's claim remains unsupported. Exhibit P1 a collection of demand notices though undisputed but in my considered view cannot be conclusive evidence and basis of the plaintiff's claim. The demand notices could only add and support or corroborate all the other evidence had there been any and not otherwise. Likewise, exhibit P2, does not disclose any useful information to advance the plaintiff's case. Exhibit P2, regardless of being recognized by DW1 and DW2 and the fact that it was signed by DW1, the Executive Director, the letter does not disclose much...this court declines the invitation by Mr. Msemo, urging the court to hold that the outstanding amount reflected in exhibit

P1 is the same amount admitted by the defendant in exhibit P2 since there was no any counter figure indicated in their pleading and defence. Exhibit P2, signed by DW1 though admits liability, but the document does not disclose liability in respect of what and the amount involved. Nowhere in the exhibit P2, it has been stated that the outstanding is for the cement worth TZS 243,081,500/= or TZS 6,796,000/= claimed for transportation. The letter could be in reference to other business transaction between the parties and the outstanding amount different from the one reflected in exhibit P1.

Failure to furnish the court with such important evidence places the plaintiff's claim that there was agreement albeit oral between the parties and/or that plaintiff performed its obligation while the defendant did not, lacking..."

The trial judge, thereafter, answered the first issue to the effect that the appellant failed to fulfil its obligation against the respondent of supplying the said bags of cement. As it turned out, the other issues were accordingly decided against the appellant.

On the other hand, though PW1 stated in his witness statement that the delivery of 13,885 bags of cement at Mtwara was supervised by his operations manager, PW2, nothing was stated by the later on whether he

had delivery notes which were signed as an acknowledgment by the respondent's officers on the respective date or dates. PW2 at paragraph 5 of his witness statement simply stated as follows:

> *"That in the said supply to the defendant my role was to supervise the delivery of cement as per Defendant's order. Receipt of the said cement was through the engineer or site foremen on behalf of the defendant."*

Unfortunately, PW2 did not mention the name of the said engineer or site foremen of the respondent who received the said bags of cement given the assertion that he was at Mtwara site throughout the period of the execution of the contract. This leaves a lot of doubts on the veracity and reliability of PW2's evidence on how the delivery was done and who received the same at the respondent's site. Indeed, PW2's evidence cannot be relied on to support that of PW1 which also lacks substance in so many ways in respect of how the alleged oral contract was executed. PW1 did not also show what was the means and how the appellant communicated with the respondent during the alleged execution of the agreement and when exactly it started in 2013.

In the circumstances, the argument that the trial judge improperly found that exhibit P1 was not sufficient proof that the respondent was

indebted and that she did not pay the outstanding amount is unfounded. Exhibit P1 which consisted four letters written by the appellant's lawyer without indicating the background facts of the agreement of the parties, the period in which the supply was done, cannot, in our view, be solely relied on to prove the appellant's suit mindful of the gaps in the evidence of PW1 and PW2 on how the alleged oral agreement was performed by the appellant. In addition, the submission by Mr. Kibatala that the respondent agreed to the existence of the oral contract through paragraphs 4 and 5 of the written statement of defence is not tenable. Those paragraphs cannot in any way be taken as an admission by the respondent that the said agreement was performed to the extent of the appellant claiming the outstanding amount. For avoidance of doubt, we better reproduce what is revealed in those paragraphs hereunder:

> *"4. That the contents of paragraph 5 of the Amended Plaint are strongly disputed and the Plaintiff is put to strict proof thereof. The Plaintiff is the one to blame for failure to address on time anomalies raised out of discharging its duties under the agreement.*
>
> *5. That the contents of paragraph 6 of the Amended Plaint are disputed and the plaintiff is put to strict proof thereof. The defendant states*

that the said letter was subject to fulfillment of the obligations assigned to the parties during round table negotiations and the same could not materialize due to plaintiff fault in discharging its obligation as discussed."

According to the record of appeal, we note that DW1 consistently denied the existence of the contract between the parties and the indebtedness of the respondent as demonstrated through paragraphs 5, 6, and 7 of his witness statement.

Particularly, DW1 stated:

"5. That the plaintiff allegations to have supplied the cement to the defendant site in Mtwara worthy TZS 243,081,500.00 and transportation costs TZS 6,796,000/= are misplaced as the plaintiff never supplied the said material to the defendant.

6. That the plaintiff failed to produce any delivery notices and invoices to the defendant after been (sic) required to do so in order to establish its claim against the defendant.

7. That the parties had done previous business in which the defendant duly paid the plaintiff as per sale contracts. The parties have never entered into any contract for present claims and the

defendant has never received any invoices for the alleged goods."

The testimony of DW1 is supported by DW2 who was the person responsible for the contract management with suppliers and vendors as reflected in paragraphs 6 and 9 of his witness statement.

It is noteworthy that both DW1 and DW2 during cross-examination maintained the position stated in their respective witness statements. We are thus of the view that the averment in paragraphs 4 and 5 of the amended written statement of defence is not an admission of the debt by the respondent at all. In the said statement, DW2 went to the extent of stating that he called PW1 in his offence to substantiate the claim on the outstanding amount but he could not produce any document to that effect.

With regard to exhibit P2, during cross examination, though DW1 admitted to have been the one who signed it, he denied that he had been in discussion with the plaintiff through PW1. However, he stated that when he was informed by his officers, he stated that if there was any outstanding balance, he would have paid but he did not mean it was the disputed amount. Indeed, DW1 insisted that it was for that reason that there is no indication of the outstanding amount in exhibit P2.

Considering the testimonies of DW1 and DW2, the onus was thus on the appellant to establish how the outstanding amount was arrived at by showing cogent evidence like, delivery notes of the supplied cement, receipts and the number of the vehicles that transported the bags of cement as correctly reasoned by the trial judge. As intimated above, even PW2 who was better placed to discharge the burden on how the delivery was done since his alleged role at Mtwara was to supervise the delivery of cement to the respondent's site during the execution of the oral agreement did not do so. Basically, in his witness statement, PW2 never mentioned the names of the engineer or foremen of the respondent who received the said bags of cement.

In the circumstances, we respectfully disagree with the appellant's counsel argument that since it was an oral contract the issues of invoices and delivery notes and other relevant documents were trivial and irrelevant.

In the result, we do not find any justification to differ with the trial judge findings that the appellant failed to prove the case on balance of probabilities as it is in tandem with our re-appraisal of the evidence on the record as a whole as demonstrated above. It follows that exhibit P2 cannot be relied on to support exhibit P1 as argued by Mr. Kibatala.

It was thus the duty of the appellant to prove her claims on balance of probabilities as required in civil case that there was an oral contract which was breached by the respondent and as a result she is entitled to the relief sought before the trial court.

In **Anthony M. Masanga v. Penina (Mama Migesi) & Lucia (Mama Anna)** (Civil Appeal No. 118 of 2014) [2015] TZCA 556 (18 March 2015, TANZLII), we stated:

> *"... 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 with the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 of the Revised Edition, 2002.... It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case".*

In the case at hand, it is apparent that even after considering the evidence of PW2 which was not taken into account by the trial court, we are satisfied that taking the evidence on the record as a whole even if we are to agree with the appellant's contention that the agreement between

parties was orally reached, still she did not discharge the burden of proof as required by law.

In the event, we dismiss the first and fourth grounds of appeal for lacking substance.

In the final analysis, save for the second ground of appeal which we have allowed, we dismiss the appeal with costs.

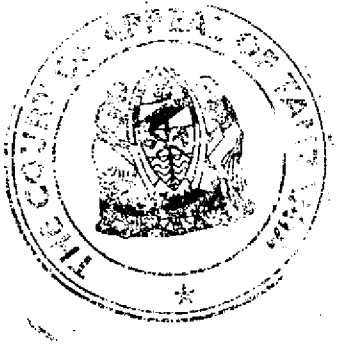
DATED at **DAR ES SALAAM** this 27th day of November, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 29th day of November, 2023 in the presence of Mr. Roman Masumbuko, learned advocate for the Respondent, also holding brief for Mr. Peter Kibatala, learned advocate for the Appellant is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL