IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 51 OF 2022

(Arising from Civil Case No. 30 of 2021 in the District Court of Kinondoni at Kinondoni, Dar es salaam Before Hon. J.A KALUYENDA SRM)

ALISAAR COMPANY LIMITED..... APPLICANT

VERSUS

VENERANDA FULGENCY .....RESPONDENT

JUDGMENT

21st April & 16th June 2023

MKWIZU, J.

This is the first appeal by **ALISAAR COMPANY LIMITED**, the appellant herein originating from the judgment of the District Court at Kinondoni in Civil Case No 30 of 2021. The genesis of the dispute is an oral contract between the parties where the appellant is alleged to have contracted the respondent a hardware dealer in Tegeta Dar es Salaam, in 2018 and entered into a contract, for the supply of various hardware materials to the appellant's industry also located in Tegeta at a consideration of Tanzanian Shillings twenty-one million, Five Hundred Ninety-four and one hundred (21,592,100/=). It is from the respondent's (original plaintiff) plaint that the respondent honored the contract and delivered the material to the appellant as required, however to his dismay, the appellant did not pay as required. The trial district Court magistrate found in favor of the respondents after being satisfied that the respondent has proved her case to the required standards. Declaration was made to the effect that the respondent is in breach of the contract, with an order awarding the

respondent herein 42,094,100, general damages to the tune of 3000,000/=, and costs of the suit.

Discontented, the appellant has approached this court with a memorandum of appeal advancing three grounds of appeal as follows: -

1. *That the trial Magistrate erred in law and fact by stating that there was an agreement without evidence to prove the said existence.*
2. *That the trial magistrate erred in law and fact by stating no objection to the admission of exhibits amounted to having an agreement.*
3. *That the trial magistrate erred in law and fact by stating that the defendant had the onus of proof.*

Hearing of the application proceeded by way of written submissions. The appellant enjoyed the services of Ms. Salha Mlilima learned to advocate while the respondent had the services of Ms. Victorial Paul also a learned advocate.

Ms. Mlilima submissions on the first ground of appeal are essentially a blame on the trial magistrate's failure to evaluate the evidence. She censured the plaintiff's evidence for lacking necessary documentary proof namely the claimed agreement, documents proving that Pw2 was the appellant's employee, and the delivery notes to prove that the alleged material was indeed delivered to the appellant that would have justified the trial court's decision. She cited to the court the case of **Shabani s/o Adam Mwajulu &Baraka Msafiri Malapela Vs the Republic**, Criminal Appeal No.131 of 2019, and **Yasin s/o Mwakapala Vs The Republic, Criminal** Appeal no 13 of 2012(All unreported) to bolster her argument.

Regarding the second ground, the appellant's counsel said, that, though the admissions of exhibit P1 were not objected to, the cross-examination of the witness discredited the evidence, and it was made clear that the exhibits were not qualifying the claimed agreement by the parties.

Citing to the court the provisions of section 110 of the evidence, and the case of **Ziad Mohamed Rasool General Trading Co.L.l.C Vs Anneth Joachim Muchi**, Civil Case No.21 of 2020(unreported) in support of the complaints laid in ground three the appellant counsel contended that the trial court was in error for shifting the burden of proof to the defendant-now appellant contrary to the law. And lastly prayed for the appeal to be allowed with costs.

Responding to the first ground of appeal, respondent counsel said, points on improper evaluation of evidence by the trial court raised in the appellant's submissions is a new ground not advanced in the memorandum of appeal. She said the submissions are not in support of any of the three grounds of appeal. She invited the court to disregard the grounds.

Arguing in the alternative, Ms. Victoria Paul said, even assuming that the argument was properly premised still, the appellant counsel did not show to the court evidence that she thinks was omitted and to what extent was improperly considered. She was in support of the trial court's decision saying that it encompasses all the adduced evidence with a proper evaluation.

Regarding the complaint on failure by the plaintiff to tender the claimed agreement, Ms. Victoria Paul stated that the appellant is trying to deny the existence of oral agreement contending that, section 10 of the law of Contract Act, Cap 345 [R: E 2022] acknowledges oral agreement as valid agreement provided they are made by free consent of parties competent to contract, for a lawful consideration and with a lawful object. She supported her arguments with the decision in **Leonard Dominic Rubeye i/a Rubuye Vs Yara Tanzania Ltd**, Civil Appeal No. 219 of 2018, and **Sudhir Kumar Lakihanpa V Rajan Kapoor and Regalia Tanzania Limited**, Civil case No 125 of 2019(All unreported). She was of the view that the oral agreement was proved before the court by way of testimonial evidence by PW1 and PW2 the evidence that was left intact.

Regarding the second ground of appeal, the learned counsel said, exhibit P1 was admitted without an objection from the appellant's counsel indicating an acceptance of its content by the appellant. Citing the decision of Abas **Kondo Gede Vs the Republic**, Criminal Appeal No. 472 of 2017, she said the appellant cannot at this stage of appeal raise any concern on the authenticity of exhibit P1.

Ms victory also was of the view that the trial court was right to require proof from the appellant after he had asserted facts querying the authenticity of exhibit P1. Stressing on the onus of proof doctrine, Ms. Victoria Paulo said, a general rule is that the burden of proof lies on a party who alleges. She lastly prayed for the dismissal of the appeal with costs.

I have enthusiastically considered the written arguments in support of the appeal in line with the grounds of grievance. The three grounds of appeal

presented raise three pertinent issues for determination by this court. (i)*whether the plaintiff managed to prove the existence of an agreement between the parties, (ii)whether failure to object to the admissibility of exhibits meant acceptance of the contents of exhibits tendered (iii) whether the shifting of the onus of proof to the defendant (now appellant) was erroneously done.*

I propose to discuss the grounds of appeal in a pattern preferred by the parties beginning with the first ground whether the plaintiff managed to prove the existence of an agreement between the parties. And since this is a first appeal, the court will do a critical review of the material evidence on record to test the soundness of the trial court's findings. This is the position well settled and there is a plethora of authorities on the point including Standard **Chartered Bank Tanzania Ltd v. National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 (unreported) in an equivalent situation the Court held that:

> *"The law is well settled that on the first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination to determine whether the findings and conclusions reached by the trial court stand (Peters v. Sunday Post, 1958 EA 424; William Diamonds Limited and Another v. Rf 1970 EA 1; Okeno v. R, 1972 EA 32".*

Reverting to the first issue of whether there was any contract established between the Appellant and the Respondent, the Respondent contended to have entered an oral contract with the Appellant. She did not, therefore, tender any written contract in court, claiming that the two had an

agreement on which she was to supply building materials to the appellants including paints, gypsum powder, gypsum boards, screws while cementing, panel pins, glue, etc.

The trial magistrate's decision was based on the evidence by Pw1, Pw2, and two exhibits P1 and P2 which he found credible. PW1 is the plaintiff who informed the court that initially, the transactions were on a cash basis. Later things changed when the two got used to each other. At that later stage, the materials were delivered on credit until when the amount accumulated to 21,248,100. They negotiated, and the appellant acknowledged the debt on 4/12/2019 followed by a written confirmation of the debt on 18/1/2020. Acknowledgment and debt confirmation notes were admitted as exhibit P1. And PW2 is a driver who worked with the defendant. His testimony was on his involvement in ferrying the materials from the respondent's shop to the appellant's industry. The defendant's evidence was discredited for failure by the defendant, now appellant to prove the forgery allegation raised in the defence.

This is a civil suit where the standard of proof is always on the preponderance of probability, the principle acclaiming evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it. This position was well articulated by the Court in Anthony **M. Masanga Vs. Penina (Mama Ngesi) and another**, Civil Appeal No. 118 of 2014 (unreported), the Court of Appeal cited with approval, the case of Re B [2008] UKHL 35, where Lord Hoffman, provided the most lucid definition of the term "balance of probabilities" to mean: -

"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt Is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned to and the fact Is treated as having happened".

The plaintiff asserts an oral contract that naturally carries little documentary value. They, however in law considered as valid as a written contract provided, are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object. In **Leonard Dominic Rubeye t/a Rubuye Vs Yara Tanzania Ltd**, (Suprra), a case cited by the respondent's counsel, the Court of Appeal held:

"It is ludicrous to hear any of the parties contending that was a contract between them and the terms thereof simply because there was no written contract for, in law, it is not necessary that an Agreement must be in a written form".

Thus, the existence of an oral contract is established by evidence other than textual evidence. I have evaluated the above evidence by the parties. There is no doubt that the plaintiff's evidence confirms the existence of the agreement between the two more than the opposing arguments given by the defendant (appellant) witness (DW1). Exhibit P1 is a document in which the defendant acknowledged and confirmed the debt resulted in the

alleged breach of contract. These two documents are written on the appellant's headed paper, containing the defendant's company logo, and are said to have been signed by the Defendant's company director named Hidary. Unfortunately, the said Hiadary did not dispute the said signature and there was no reason why he was not called before the court to counter the PW1's evidence, instead, while refuting having transacted with the plaintiff, DW1 was keen enough to admit, during cross-examination that he was not involved in the transaction at issue, drafting or signing exhibit P1. This leaves the plaintiff's evidence in relation to the validity of the contract between the two parties herein undisrupted.

Secondly, PW2's evidence was left uncontroverted. This witness asserted to have been the defendant's driver who used the defendant's vehicle to collect building materials from the plaintiff. Though the defendant's advocate queried the PW2's employment status with the defendant, there were no signs of disowning the two vehicles that were mentioned to have been used by this witness in collecting the alleged materials. The truth here is, had there been no agreement between the parties, the appellant would not have permitted her vehicles to collect materials from the plaintiff's office.

In short, if I was to set the party's evidence into a well-fitted weighing machine, the same would tilt in favour of the plaintiff (now the respondent) that there was the existence of an oral contract between the two parties. This finding is fortified by the failure by the defendant (now appellant) to query the admission of exhibit P1, the acknowledgment, and confirmation of the debt documents by the defendant. When giving her evidence in

court on 16/8/2021, PW1 on pages 10 and 11 of the trial court proceedings was recorded to have said:

> *"The debt reached 21,248,600/=Tshs. After that, I found a lawyer who prepared a demand note which I myself took to them. Before that, seeing that the debt was big, I had to sit with them and do a reconciliation. He then prepared /wrote me after indicating the debt and then later on he wrote another letter to verify the debt. This is the agreement that they wrote to me on the debt. It was written by Director Hydary Hawadh on 04/12/2019 and verified on 18th Jan 2020. I pray the court admits it as an exhibit.*
>
> ***Mr Ndunguru**:No objection*
>
> *Order: Agreement for payment and verification letter thereto are both admitted and marked collectively as P1 exhibit"*

Failure by the appellant's counsel to object to the admissibility of exhibit P1 connotes his comfortability with its authenticity. Had there been any query on the authenticity of the said documents, the appellant's counsel would have right away raised it before the admissions of the documents? This is more so because, from its initiation, the plaintiff's pleadings contained the named documentary evidence admitted in court with all the copies attached to the plaint meaning that the defendant (now appellant) had enough time to verify both its authenticity and anything connected to the validity of the alleged information therein before trial. But according to the records, there is no complaint lodged in court regarding the said documentary evidence, nothing was raised during their admissions, except for an unproven forgery allegation that was brought to court belatedly during the defence. In fact, it does not sink into one's mind that, a person would remain mum while

seeing a document claiming such a reasonable amount of money with his signature forged getting into the court's records without saying a word just to come out at a later stage, during the defence to raise such a serious allegation of forgery. The only reasonable mind would under the circumstances of this case, find the as session as an afterthought.

Next is whether the shifting of the onus of proof to the defendant (now appellant) was erroneously done. According to the trial court's decision, the defendant, now appellant was required to prove forgery assertions brought by DW1 against exhibits P1 and P2, and this came after the trial court's findings that the plaintiff's (now respondent) evidence is credible. The arising question is, was this position taken by the trial magistrate legally permissible?

In law, the burden to prove a fact in an issue lies on the party who desires the court to resolve that issue in his favour. The burden of proof in civil cases is provided for under sections 110,111, and 112 of the Evidence Act.

> *"110.-(1) **Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of 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.***

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side*.*

112. The burden of proof as to any particular fact ***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."(emphasis added)

Primarily, the plaintiff in any civil case bears the burden of proving his claims before the court. However, there is a situation where the defendant may assert facts that need to be proved. This is when the shifting of the burden of proof comes in under section 112 read together with subsection 2 of section 111 of the Evidence Act commanding the defendant to prove only facts that he ***wishes the court to believe in its existence.*** Thus, the shifting of the burden of proof involves putting the burden of proof on the person who denies or questions the assertion being made. That shifting, in my view, comes with the assumption that something is true unless proven otherwise conveyed in the case of **Goodluck Kyando Vs. Republic** [2006] TLR 363 where the Court held that every witness is entitled to credence unless there are cogent reasons for not doing so. This position was exhaustively dealt with by the Court of Appeal in **Yusufu Selemani Kimaro v. Administrator General and 2 Others**, Civil Appeal No. 226/ 2020, where it was held:

> *"Going by the above exposition of the law, it would be insincere if not a misapprehension of the law on the part of Mr, Halfani to complain as he did that the trial Judge had shifted the onus of proof onto the second respondent. For, in* ***civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties,*** *and a* ***party who wants to win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary****. This is so because as per the case of* ***Raghramma v. Chenchamma****, A 1964 SC 136, such a* ***shifting of the onus***

is a continuous process in the evaluation of evidence. "(emphasis supplied)

There is no doubt that the forgery claims were asserted by DW1 and since the claim was aimed at discrediting the already tendered evidence by the plaintiff, its credibility was only subject to proof from the defendant, now appellant, knowledgeable of the alleged facts. The appellant's evidence at the trial court was scarce to warrant discrediting PW1's evidence by the court. The complaint in the 3rd ground is also unfounded.

The above notwithstanding, this court is of the view that the awarded amount was far beyond what was established before the court. It is from the pleadings that a total amount of 42,094,100/= was pegged as specifically damaged. Tsh. 21,594,100/= was a figure for an outstanding amount while the 20,500,000 was an amount of interest for failure by the plaintiff to repay the loan after the alleged breach. The plaintiff's evidence managed to prove the actual, outstanding amount of Tsh. 21,594,100/= established by exhibits P1 collectively.

My assessment of evidence has failed to find any evidence in relation to the remaining 20,500,000/=. As pleaded, this claim falls under a specific category requiring stringent proof. See for instance the case of **Zuberi Augustino Mugabe vs. Anicet Mugabe** [1992] T.L.R. 137; **Xiubao Cai and Maxinsure (T) Ltd vs. Mohamed Said Kiaratu**, Civil Appeal No.87 of 2020, (unreported) and **Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited,** Civil Appeal No.21 of 2001 (CAT) (unreported). In this latter case, the Court emphasized that a claim for specific or special damages must not only be pleaded but also its particulars

must be specifically stated and strictly proved. Paragraph 11 of the plaint is an averment relating to this amount. The plaintiffs asserted that:

> *"11. That the defendant's act of refusing to pay the money for the purchasing price of the Building material has caused the Plaintiff to pay Tanzanian = Shillings Twenty million and Five hundred Thousand (20,500,000/= only being the interest for the failure to pay the Loan on time to NMB Bank and EFC Bank. …"*

Apart from the above assertion, no further evidence was adduced to justify the award of the above amount. I am therefore convinced that, the trial court misapprehended the evidence leading to an erroneous award of the 20,500,000/= as loss of interest on top of the outstanding amount claimed in the plaint.

To that end, the appeal is partly allowed to the extent explained above. The rest of the grounds are dismissed for lacking in merit.

Order accordingly.

DATED at **DARE ES SALAAM** this **16th** day of **JUNE** 2023.

E.Y. MKWIZU

JUDGE

16/6/2023