IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HC. CIVIL APPEAL NO.27 OF 2019

(Arising out of the Decree and Judgment of the Resident Magistrate Court of Mwanza at Mwanza in RM Civil Case No.20 of 2018)

OLASITI INVESTMENT CO.LTD .....APPELLANT

VERSUS

ELIAS PETER NYATOMWANZA

t/a ISAGILO EXPRESS ..... RESPONDENT

JUDGMENT

Last Order: 16.03.2020

Judgment Date: 25.03.2020

A.Z.MGEYEKWA, J

This is a first appeal. It stems from the decision of the Resident Magistrate Court of Mwanza in Civil Case No. 20 of 2018 whose judgment was rendered on 18.03.2019. In that case, the appellant instituted a suit against the respondent seeking several orders of

the court that; the respondent has to pay the appellant monies amounting to Tshs. 65,612,906/- being indebted sum as a result of the fuel supply, Payment of general damages, interest of the decretal sum at the rate of 21% per annum from the date of the judgment till payment in full, costs of the suit and any other relief this court may think just to grant.

As the record reveals, between September 2016 to May, 2017 the appellant and the defendant entered into an agreement that the Plaintiff agreed and duly supplied diesel to the defendant's vehicle with registration No. T 852 AKV, T 179 AKV, T 798 AKV, and T 174 BZG. The respondent agreed to pay the price for the fuel supplied to the vehicle at the end of each month without fail but he only paid for the year 2016. The outstanding balance was Tshs. 65,612,906/=.

Consequent to the said indebtedness the parties signed an agreement on 7th day of November, 2017 whereas, the respondent acknowledged the debt and promised to settle the outstanding amount in installments but he never paid a single installment even after the appellant served the defendant with

several demand notices requiring the respondent to settle the outstanding sum, all the efforts taken by the appellant were futile. Therefore the appellant decided to institute a case before the Resident Magistrate Court and the Resident Magistrate Court decided in favour of the respondent. The appellant could not see justice in the decision hence aggrieved and appealed to this court against the RMs decision basing on the following grounds.

1. *That, the trial court erred in law and facts in holding that Exhibit P1 and Exhibit P2 was void ab initio and unenforceable.*
2. *That, the trial Magistrate erred in law and fact in holding that the Plaintiff had failed to prove his case on the balance of probability.*
3. *That, the trial court grossly erred in law and facts in dismissing the Plaintiff's suit besides answering the 1st and 2nd issues in affirmative in favour of the Plaintiff.*

When the matter was placed for hearing, the respondent did not show appearance even after duly being served. The appellant was represented by Mr. Kassim, learned counsel.

At the commencement of the hearing, Mr. Kassim submitted that the trial court grossly erred in law and fact holding that Exh.

P1 and Exh. P2 were void, he referred this court to the last page of the judgment and argued that the main ground for dismissing the suit was based on Exh.P1 by stating that the Exh. P1 was supposed to bear an official seal of the appellant and that the document lacks a stamp duty c/s 25 (b) of Stamp Duty Act Cap.189. Mr. Kassim argued that the trial Magistrate erred to decide that the agreement was unenforceable as she cited a non-existence provision of law, section 39 (1) and (2) of Company Act while the said Act was revised to Companies Act, Cap. 212 and was signed in June, 2002.

It was his further submission that section 30 (1) (a) of the Companies Act Cap. 212 provides that contract of behalf of a Company be in writing, signed by any authoritative person among others. He added that the issue of an official seal is not included.

Mr. Kassim went on arguing that it was not right to rule out that company agreements are voidable *abinition* since the cited section 25 (b) is irrelevant, he stated that the contract was admitted and marked as Exh. P1, it was not stamped thus it cannot be said that it was voidable *abinition*. Mr. Kassim fortified

his argument by referring this court to the case of **Elibariki Mboya v Amina Abed** 2000 TLR 22 it was held that failure to stamp a document is not an irregularity, it was his opinion that the court could direct the plaintiff to affix a stamp duty on the said document.

The learned counsel for the appellant continued to argue that Exh. P1 was an acknowledgment of debt and the respondent acknowledged he was indebted of Tshs. 65,612,906/= therefore under section 2 (1) (e) and section 10 it was a contract not a memorandum of understanding. He referred this court to the provision of law which listed all void and unenforceable contracts from section 23 – 36 of the Law of Contract Act.

Arguing for the second ground of appeal the learned counsel for the appellant stated that the trial court failed to prove the case on the balance of probability. He referred this court to section 110 – 113 of the Law of Evidence Act. He argued further that in the instant case balance of probability is clearly seen when the appellant tendered four exhibits in court to prove his case; acknowledge of debt (Exh.P1), delivery note (Exh, P2), leger book (Exh. P3) and Demand Note (Exh. P4). He added that the

appellant proved his case by showing the exact amount, the respondent was indebted.

In respect to the third ground of appeal, Mr. Kassim argued that the trial Magistrate erred in law to dismiss the Plaintiff's suit besides answering the 1st and 2nd issues in affirmative. He clarified that the court framed 5 issues and the trial court determined the 1st, 2nd and 3rd issues in favour of the appellant but he denied to analyse the 4th and 5th issues because of Exh. P1 was declared a void agreement. He valiantly lamented the trial Magistrate after finding that the 1st, 2nd and 3rd issues were answered in affirmative, she was required to continue with the case instead of dismissing it. He went on that she was in a position to expunge Exh. P1 and her decision could rely on the remaining exhibits, thus she could find that the respondent is indebted by the appellant.

Mr. Kassim went on to submit that this is a first instance court thus it has the power to evaluate evidence on record, he asked this court to evaluate the evidence on record and find that the appellant is entitled to be paid Tshs. 65,612,906/= a debt acquired

by the respondent after filling fuel at the appellant's petrol station. In conclusion, he prays this court to allow the appeal with costs.

After carefully going through the submission of the learned counsel for the appellant and the record in the trial court, I will now determine ***whether the appeal is meritorious?***

Before embarking to determine the grounds of appeal, I would like to address the issue of stamp duty that, the trial Magistrate entered into error by not affording the appellant a chance to pay for stamp duty if she could have done so then exhibit P1 might could have form part of the evidence. Guided by the case of **Josephat L.K Lugaimukamu v Father Canute J. Mzuwanda** (1985) TZHC 9, 1986 TLR 69 that as long as the document was already been admitted in court as an exhibit, therefore, the court can allow the appellant to pay the requisite stamp duty. The order was issued to the appellant and appellant had complied with the court order. Therefore, I proceed to determine the issue whether the trial Magistrate on the strength of Exhibit P1 together with the rest exhibits the trial Magistrate was correct in coming to the conclusion to which she made.

In the record, I do find that the parties agreed that their business relationship in this matter was triggered by an agreement (contract) supported by other documentary evidence. Starting with the first ground of appeal, that the trial court erred in law and facts in holding that Exhibit P1 and Exhibit P2 was void *abinitio* and unenforceable. It is in the record that PW1 testified in court that the appellant and the respondent entered into an agreement and they agreed that the respondent's vehicle will fill diesel at the appellant's filling station. To recover the outstanding bill of Tshs. 65,612,906/= the respondent was required to pay Tshs. 4,000,000/= every month through CRDB account No. 0150200646800. The contract started to operate on 5th day December, 2017 and each part was required to abide by the duration set for paying the debt, both parties signed the contract. The written contract was admitted as Exh. P1.

Under our law, all agreements are contracts if they are made by free consent of the parties who are competent to contract, for a lawful consideration and with a lawful object and are not on the verge of being declared void. That is the essence of section 10 of the Law of Contract Cap.345 [R.E 2019].

Additionally, the contract is legally enforceable if both parties were willing to agree and if they were not forced in any way as stated under section 13 of the Law of Contract Act Cap.345 [R.E 2019]. Furthermore, a contract is valid if none of the parties was induced to enter into the contractual agreement, and if both parties were on sound mind thus automatically the contract abide both parties. I have perused the court records and found that all the ingredients of a valid contract were fulfilled.

The trial Magistrate in her judgment held that the contract was supposed to be signed by two directors or secretary of the company. I have perused the court records and found that both parties signed the contract. On behalf of the appellant, the Directors one Symporin Moshi signed the contract on behalf of the entity). I am in accord with the learned counsel for the appellant that the contract was signed by the right person who was authorized as stipulated under the provision of section 30(1) (a) of the Companies Act, Cap. 345 [R.E 2019]. that:-

> *" 30. (1) Contracts on behalf of a company may be made as follows:-*

(a) a contract which if made between private persons would be by law required to be in writing, signed by the parties to be charged therewith, ***may be made on behalf of the company in writing, signed by any person acting under its authority****, express or implied" [Emphasis added]*

Based on the above authority it is clear that in all respects, the agreements entered between the parties herein are valid and enforceable.

As to the second ground of appeal, the appellant complained that the trial Magistrate erred in law and fact in holding that the Plaintiff had failed to prove his case on the balance of probability. It is trite law that the burden of proof is on the claimant; who must prove on the balance of probabilities that his case is true that means the court must be satisfied that on the evidence, the appellant proved his case on the balance of probability. The balance of probability requires a fact to be proved and the proposed issues were; *whether the pleading entered into an agreement to supply fuel to the defendant, whether the said supply of the fuel was delivered to the*

defendant, whether he defendant entered an agreement to settle the debt.

In the instant case, the appellant tendered four exhibits to prove his case, Exh. P1 proves that parties entered into an agreement after noting that the respondent was indebted Tshs. 65,612,906/= being the costs of fuel supplied by the appellant, the respondent was required to deposit Tshs. 4,000,000/= each month to the appellant's bank account, both parties signed the agreement, failure to pay the debt the same amounts to a breach of contract. Additionally; the appellant tendered other exhibits which proved that the respondent was in debt and he was required to pay the appellant an outstanding amount of Tshs. 65,612,906/=. In record there is a delivery note (Exh. P2) which proved that the respondent was fuelling petrol/diesel at the appellant filling station, Ledger book tendered in court as exhibit P3 it proved that all the debts were recorded, and the outstanding amount was shown and a demand note was tendered and admitted as exhibit P4, it proved that the respondent acknowledged and prayed for some days to clear the said loan. As admitted by the trial Magistrate I have found that

all three issues were answered in affirmative that means the appellant proved his case to the balance of probability that the respondent is indebted and without doubt section 110, 111, 112, and 113 of the Law of Evidence Act, Cap.6 [2019] were complied with. Therefore, this ground is answered in affirmative.

With regard to the third ground of appeal, I find that after noting that the 1st, 2nd and 3rd issues were answered in affirmative then it is obvious that the 4th issue is also answered in affirmative because the respondent was in breach of contract. Regarding the 5th issue, the same is answered in affirmative, the appellant is entitled to reliefs because he has proved his case to the required standard of the balance of probability.

In upshot I find that the appeal has merit, therefore, I proceed to allow the appeal with costs and grant the appellant's prayers and order as follows:-

1. The respondent to pay the appellant monies amounting to Tshs. 65,612,906/- being indebted sum as a result of the fuel supply.
2. *Payment of general damages a tune of Tshs. 10,000,000/=*

3. The interest of the decretal sum at the rate of 15% per annum from the date of the judgment till payment in full.

Order accordingly.

Dated at Mwanza this date the 25th day of March, 2020.

A.Z.MGEYEKWA

JUDGE

25.03.2020

Judgment delivered in the chamber this 25th day of March, 2020 in the presence of the appellant.

A.Z.MGEYEKWA

JUDGE

25.03.2020