

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(Kigoma District Registry)

AT KIGOMA

DC. CIVIL APPEAL NO. 7 OF 2019

*(Original Civil Case No. 4 of 2015 of the Kigoma District Court at Kigoma)
before Hon. S.J. Kainda, SRM.*

OSHIMANDEKO CONSTRUCTION COMPANY LTD.... APPELLANT

VERSUS

FUEL MASTER (T) LIMITED..... RESPONDENT

J U D G M E N T

27/05/2020 & 03/06/2020

I.C. MUGETA, J.

The respondent sued the appellant for recovery of Tshs 21,299,350/= being unpaid balance of Tshs 44,229,350/= for fuel supplied on credit. The trial court found that the unpaid balance was Tshs 17,664,400/=. The respondent was also awarded Tshs 2,000,000/= as general damages and interest at 5% from the date of judgment till full payment of the debt. Aggrieved, the appellant lodged this appeal with a memorandum of appeal containing five grounds of complaint. With leave of the court she filed additional four grounds of appeal in a supplementary memorandum of appeal.

At the hearing, Daniel Rumenyela, learned advocate for the appellant abandoned the complaints in the memorandum of appeal save for the fifth ground which is that the trial court erred in law and facts when it granted the relief(s) without addressing them to any of the parties. The learned counsel, therefore, argued all the complaints in the supplementary memorandum of appeal. In the course, he dropped the second ground which is that the respondent had sued a wrong party. The grounds of appeal covered, therefore, are:-

- (i) That the trial court erred to entertain this suit without being accompanied by a resolution of the company's board of directors authorizing initiating these proceedings.*
- (ii) That the trial court erred to decide the case without considering the defence of the appellant/defendant.*
- (iii) That the judgment is a nullity for being composed on 8/9/2019 but delivered on 7/9/2019.*
- (iv) That the trial court failed to state to whom it awarded the relief(s) granted.*

The sixth ground of appeal in the supplementary memorandum of appeal challenged the documents admitted from the respondent/plaintiff as being from a wrong party. This complaint was not argued, understandably because ground two which concerned suing a wrong party had been dropped.

I shall determine one complaint after another seriation. Before that, let me state that the respondent is represented by Method Kabuguzi, learned advocate.

Counsel for the appellant submitted that according to case law, a company can sue upon proof that the board of directors has authorized the litigation. The learned counsel cited to me the case of **Investment House Ltd vs Webb Technologies (T) Ltd and 2 others**, commercial case No. 97/2015, High Court, commercial Division (unreported).

I do not intend to go into details of arguments by the parties on this issue. In that regard, I shall not even state what the reply by the counsel for the respondent was. The reason for this is that this objection ought to have been taken and decided upon by the trial court which was not the case. There are two objections which can be taken and accepted on appeal even when not argued before the trial court. These are objections relating to jurisdiction and time limitation. On this account I find no merits in the first ground of complaint.

Was the defence case not considered as argued in the second complaint? Counsel for the appellant complained that the judgment throughout recites the plaintiff's case and it ignored even exhibit D1 which proves that the debt had been paid in full. He further argued that had the trial court considered the defence evidence, it would not have arrived to the conclusion it made. That its finding that exhibits P2 read together with exhibit P3 proved the debt is unfounded as the appellant never admitted any debt.

In reply counsel for the respondent submitted that the evidence of both sides was considered. In his view, the evidence of PW2 and DW1 was similar and on that account the trial magistrate had no good reason to recite similar evidence. To establish that the defence evidence was considered, the learned counsel referred to page 3 of the judgment where some claims were rejected for want of proof.

I have read the judgment of the trial court, I am of the view that indeed the defence case was not considered. Even when the claim for the respondent was rejected, the rejection was still based on the doubts in the respondent/plaintiff's case. This irregularity is fatal to the legality of the judgment. In such situation, and since this is a first appeal, the first appellate court may step into the shoes of the trial court and re-evaluate the evidence as I shall hereunder do or remit back the record to the trial court to compose a proper judgment. For that reason, I hereby quash that judgment and all orders emanating therefrom. On account of what I intend to do, that is to re-evaluating the evidence, the second, third and fourth complaints above are rendered nugatory.

Let me point out that even at this stage when I step into the shoes of the trial court, the issues for determination remains the same. At the trial, three issues were framed for determination:-

- (i) *Whether the defendant owes the plaintiff the balance of the debt (sic) at Tshs 21,229,350/= sold on debt (sic) to the defendant*
- (ii) *Whether the defendant breached the contract for sale of fuel.*
- (iii) *A what reliefs the parties are entitled to?*

For academic purposes, let me digress on the content of the trial court's judgment in relation to the issues. As one can easily notice, the first two issues are ambiguous. Despite the being ambiguity, in the judgment, they were not analyzed in relation to evidence and decided upon one after another. This notwithstanding, the judgment reflects to have considered and decided on the first and the third issues. This generality can be excused in terms of order XX rule 5 of the CPC which states:-

"In suits in which issues have been framed, the court shall state its finding or decision, with the reason therefore, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit"

It is my view that deciding on issue one and three was sufficient. However, it is good practice to state in a judgment which issue is being decided at a particular point of a judgment. Having digressed, I now revert to the re-evaluation of the evidence.

As I have stepped into the shoes of the trial court, I shall, therefore, determine issue one and issue three only. The second issue becomes redundant upon deciding the first issue which, in order to remove the ambiguity, now should read:-

"Whether the defendant owes the plaintiff Tshs 21,229,350/= as unpaid balance for fuel supplied on credit"

In order to make myself clear, I start with examining the pleadings. This is important in order to determine first how much in total, the defendant owed the plaintiff. Then from evidence, I shall determine how much has been paid.

In Paragraph 3 of the Plaintiff it is pleaded:-

"That the Plaintiff is suing the defendant for recovery of the outstanding debt balance of a total of Tshs 21,229,350/= accruing from supply of fuel on credit..."

This paragraph is responded to by paragraph 2 of the Written Statement of Defence which reads:-

"The Plaintiff claims nothing against the defendant because the defendant has already paid to the plaintiff all the due debt of 23,000,000/=".

The defendant/appellant seems to acknowledge the debt even beyond the claim. However, in paragraph 8 of the plaintiff the allegation is that the total debt is Tshs 44,229,350/= where the defendant/appellant has made part payment of Tshs 23,000,000/= leaving a balance of Tshs 21,229,350/= unpaid. Further, in response to the plaintiff, paragraph 7 of the Written Statement of Defence state:-

"The contents in paragraph 8 are disputed upon to the extent that the defendant owed the plaintiff 23,000,000/= which has been paid already..."

Therefore, according to the pleadings, the debt known to the defendant/appellant was limited to Tshs 23,000,000/=. Her evidence, however, shows the contrary.

The defendant brought one witness, Wilfred Mariki (DW1). In his evidence at page 15 of the pleadings he said:-

"It is not true that we are indebted to the plaintiff at Tshs 21,000,000/=... It is not true that we paid only Tshs 23,000,000/= out of about 44 million".

DW1 continued to tender a bank statement which was admitted as exhibit D1. In this bank statement, it is shown, and DW1 said in evidence, that the defendant paid the Plaintiff up to Tshs 37,500,000/=. It follow, therefore, that the written statement of defence was evasive in terms of what was the actual claim of the plaintiff against the defendant. Limiting the liability to Tshs 23,000,000/= was part of that efforts.

From the above evidence of the defence and the pleading in the plaint, the evidence of PW1 (Onesphory Paul) and PW2 (Almodadi s/o Simon Mkoko) that the defendant paid Tshs 23,000,000/= is incredible in light of the uncontroverted payment evidence in exhibit D1. On the balance of probability, I make a finding that the total fuel supplied was indeed worth Tsh 44,229,350/= and the defendant had paid Tshs 37,500,000 and not Tshs 23,000,000/= only as alleged in the plaint and testified by PW1 and PW2.

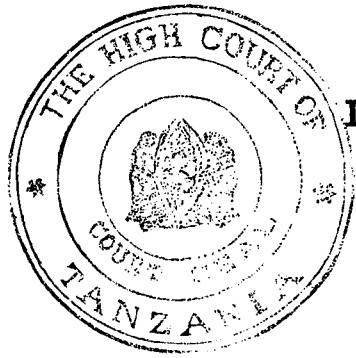
Further, in his evidence DW1 testified that the total payment made to the plaintiff was Tshs 70,000,000/= because other Tshs 13,000,000/= and Tshs

10,000,000/= were paid in cash. This further suggests that the total debt was not Tshs 23,000,000/= as pleaded in the written statement of defence. However, this payment has no proof for want of acknowledgement or payment receipts.

In his submission, Mr. Kabuguzi argued, while making reference to exhibit D1 that the dispute in this case relates to transaction commencing 9/4/2014 onwards. With respect, this is not pleaded and it is not even supported by evidence. The learned counsel referred me to the evidence of DW1 on cross examination to bring home his point. Indeed, DW1 referred to that date on cross examination. However, reading that evidence in its proper context, I see nothing suggesting conceding that the dispute relates to business transactions from 9/4/2014 onwards and not the whole contractual period.

In view of the foregoing the total unpaid balance is, therefore, Tshs 44,229,350/= minus 37,500,000/= which is equal to Tshs 6,729,350/=. The claim of Tshs 21,229,350 is not sufficiently proved.

On reliefs, I hold that the appellant owes the respondent Tshs 6,729,300/=. The decretal sum shall attract interest at bank commercial rate from the date payment was due to the date of this judgment. From the date of this judgment to payment in full, it shall attract a 7% interest court rate. The respondent is also awarded Tshs 5,000,000/= as general damages. Despite the appeal succeeding partly, I award costs to the respondent because failure by the appellant to fully settle his contractual obligation is what bred this case. I so order.



Mugeta

I.C. Mugeta

Judge

3/6/2020

Court: Delivered in chambers before Method Kabuguzi for the respondent also holding brief for Daniel Rumenyela, for the appellant.

Sgd: I.C. Mugeta

Judge

3/6/2020