

NGAILA JUDGMENT

DECIDED
27 March 2025

IN THE HIGH COURT OF TANZANIA DAR ES SALAAM SUB REGISTRY AT DAR ES SALAAM CIVIL
APPEAL NO.22791/2024. (Originating from the Judgment of Civil Case No. 73 of 2023 from the
District Court of Kinondoni at Kinondoni delivered on 13/06/2024 by Hon. A.S. Rwekiza SRM)
JOYCE NGAILA JUMANNE..... APPELLANT VERSUS NESTORY
RWELAMILA KAYUNGI..... RESPONDENT

13th & 27th March, 2025 MWANGA, J. In Civil Case No. 73 of 2023, before the District Court of Kinondoni, the appellant sued the above-mentioned respondent for payment of TZS 30,644,600 arising from a breach of contract. Gleaned from the record, the appellant agreed with the respondent for the supply of timber wood, and in return, the respondent had to pay for the same. It is alleged that, on 9th December, 2021, and 6th January, 2022, the appellant supplied the respondent with long timber wood with a total value of TZS. 30,644,600/=. To her dismay, after receiving the goods, the respondent did not pay for them promptly as agreed; therefore, according to the appellant, respondent requested an extension of 55 days from January 6, 2022. The appellant granted the respondent's request, but the assertion is that he not only failed to fulfil his obligation after the extension of time, but also neglected to receive goods from the appellant. It was further stated that on 30th March 2023 at 7:00 am to 8:00 am, the appellant, through her legal representative, served the plaintiff with a demand note demanding the outstanding balance. Upon receiving the demand notes, the respondent quickly acknowledged the debt and requested to pay it off in instalments; however, later he did not fulfil his promise after he had reconciled his accounts and realised that he had paid the appellant an excess amount of what was claimed. It is due to those facts that the appellant filed a civil case before Kinondoni, seeking the prayers expressed above. When served with the plaint, the Respondent filed a written statement of defence, accompanied by a counterclaim, claiming that he had discharged his duty and had made additional payments to the tune of TZS. 43,223,608/=. He thus prayed the court to dismiss the appellant's claim and order the appellant to pay the extra money paid to her to the tune of TZS. 43,223,608/=: general damages, cost of the suit, and any other relief this court deems fit to grant. After a full trial, the trial court was convinced that the appellant had failed to prove his case to the required standard of proof. To the contrary, the respondent proved his case and was thus awarded the prayer sought in his counterclaim. The appellant was not happy with the trial court 2 decision; she lodged the present appeal, equipped with six grounds of

appeal as follows;

1. The trial court erred in law and fact by procuring the judgment with the reliefs, which have never been prayed for by the Respondents.
2. The trial court erred in law and fact by delivering its judgment in favour of the defendant without the defendant proving its case on the balance of probabilities.
3. The trial court erred in law and fact by failing to analyse and evaluate the evidence adduced by the appellant herein.
4. That the trial court erred in law by applying the wrong principle of law in respect of contradicting the content of documentary evidence.
5. That the trial court erred in law and fact in assessing the claims that the Respondent had to be paid the extra amount of TZS. 43,223,608/=.
6. That the trial court erred in law and fact by holding that the signature of the Respondent to the content of the Demand Notice was obtained by coercion without any proof of adduced evidence by the Respondent herein to the standard acceptable in civil cases. On the strength of the above grounds of appeal, the appellant implored the court to allow the appeal, reverse the decision of the trial Court, set aside the orders thereon, and order the respondent to pay all amounts claimed and the costs of the suit. In this appeal, the Appellant appeared represented by Mr. Boniface A. K. Mwabukusi, while Sylvester Fredrick Aligawesa represented the respondent, both learned advocates. The appeal was disposed of by way of written submission. The counsel, Mr. Mwabukusi, submitted the grounds of appeal in seriatim, starting with the 6th ground. He also silently drops the 4th ground of appeal. On the other hand, Mr. Aligawesa, combining grounds 1, 2, 3, and 5, then argued the 6th ground separately, a style that I wish to adopt. Submitting in support of the appeal, Mr. Mwabukusi contended that the trial court erred in law and fact by holding that the signature of the Respondent to the content of the Demand Notice was obtained by coercion without any proof of adduced evidence by the Respondent herein to the standard acceptable in civil cases. The Respondent failed to present any evidence to prove the coercion alleged to have been acted by the Appellant. Given the fact that the Appellant raised allegations of coercion and non-indebtedness, the onus was on him to substantiate these claims as per Section 110 of the Evidence Act. To buttress his point, he cited the case of Charles Kahiza vs. Nuarukama Mugasa Makunja, Civil Appeal No. 16905 of 2024, HC, Geita. At Page 10 that, for one to prove coercion successfully needs to prove the following: first, the atmosphere during the signing process was intimidating; second, there were indications of threats, intimidation, or undue influence in the statements or actions of the police officers; third, the agreement was not entered into freely and voluntarily; fourth, the mental state of the signatory at the time of signing was not stable; fifth, the access to legal representation was curtailed; sixth, what were the circumstances surrounding the signing, including any arrest, interrogation, or detention; and seventhly, how promptly concerns about coercion were raised. He was insistent that, the respondent and even the trial Court itself lacked of evidence regarding the

first five criteria, as there is no mention of whether the environment was intimidating, if threats were made, if the signatory on demand was not acting of his own free will, or if his mental state was compromised. In the first ground of appeal, Mr. Mwabukusi argued that the trial court erred in law and fact by procuring the judgment with the reliefs, 5 which the Respondent himself has never contradicted. He said that the prayers by Respondent were, among other things, that the defendant prayed to be paid TZS. 43,223,608/= as special damages; general damages; costs of this case and any other relief this court may deem fit and just to grant. Contrary to what was found via tendered evidence by Respondent, as per the chronological payment made at Page 22 of the Judgment. It was stated that DW1 paid a total of Tshs 81,008,800. In the plaint, as special damages, PW1 claimed to owe DW1, Tshs 30,644,600/=. Thus, when Tshs 30,644,600/= is deducted from Tshs 81,008,800/=, the remaining sum is Tshs 50,364,008/=. Although from DW1's prayer in his counterclaim, he stated that he paid an additional TZS 43,223,608. Mwabukusi cited the case of Saleh Juma Haji Vs. Akiba Commercial Bank & Waungwan Auction Mart, Land Appeal No.20820 of 2024 at page 4, which quoted the case of Anania Kamala V. Tryphone Kaijunga, Misc. Land Appeal No.61 of 2021, HC, Bukoba at page 8, that- stressing that, the Court cannot grant a relief which the parties have not explicitly prayed. He was insistent that the trial Court erred in law and fact in granting relief, which has been contradicted by the respondent himself. In support of the second ground of appeal, Mr. Mwabukusi contended that the trial court erred in law and fact by delivering its judgment in favour of the defendant even without the defendant proving 6 its case on the balance of probabilities. He submitted that the term 'balance of probabilities' was defined in the case of Re B [2008] UKH 35 by Lord Hoffman as follows: "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 finding that it might happen. The law operated in a binary system, where the only values were 0 and 1. That fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by the rule that one party or the other carries the burden of proof if the party who bears the burden of proof fails to. He stressed that the trial court erred in law and fact by failing to analyse and evaluate the evidence adduced by the Appellant herein. He said that it is clear that the Plaintiff claimed a total amount of Tanzanian shillings 30,644,600/=:, and the Respondent signed a demand letter acknowledging the same. Still, the Trial Court awarded the Respondent, rather than the Plaintiff, a total amount of Tanzanian shillings 43,223,608/=:, an amount that was neither specifically proved nor contradicted by the Respondent himself. The Trial Court failed to evaluate the evidence presented before it properly. He maintained that, for this reason, the trial court erred both in law and fact in assessing the claims that the Respondent was entitled to the extra amount of TZS. 43,223,608/= while the actual figure was contradicted as postulated 7 above. He thus prays that the Trial Court Judgment be dismissed, the decision of the Trial Court be reserved in favor of the Appellant, the orders thereon be set aside, and the Respondent be condemned to costs. In rebuttal, Mr. Algawesa submitted in respect of the combined ground number 1,2,3,5 that the Trial Court was correct in her decision for the reasons that, the Appellant was the Plaintiff to the Trial Court who alleged that, she was demanding the Defendant (Now Respondent) the amount of TZS

30,644,600/= (say Thirty million, six hundred and forty- four thousand, six hundred Tanzanian shillings only) as per plaint filed in Trial Court,(hence she had a burden of proof). This was denied by the defendant, who, in his written statement of Defense, claimed in counterclaim that he had already paid the whole amount demanded, even more, to the tune of TZS. 43,223,608 (say Forty-three million, two hundred thousand, twenty-three, six hundred and eight only). He went on submitting that, during the hearing, the Defendant managed to produce exhibits proving such payments and that were undisputed, they were accepted and admitted as exhibits 'D1' and 'D2' as it is seen in the Judgment on pages 5,12,13,14, and 15 He submitted that the Defendant's witness, one Edmund Rutashoborwa Philemon, who testified as DW3, who was the Banker of CRDB Bank, testified that the disputable amount was already paid to the 8 Account of the Plaintiff (now the Appellant), something which the Plaintiff did not dispute. In his view, Since the Plaintiff (now the Appellant) is the one who alleged that she owed the Defendant (now the Respondent) was the one bared the 'burden of proof in proving her case as per requirement of Section 110 and 111 of the Law of Evidence Act, Cap 6 RE 2019. The Plaintiff did not produce any evidence proving that she did not receive the said money, as it was found after analysing issues by the Court (as found on pages 18 and 19 of the Judgement) Regarding the appellants submission that, the signature of the Defendant (now Respondent) on exhibit 'P3'made him to enter in contract and agreement that he accepted the debt, he submitted that, all criteria were met by the Defendant in cited cases by the Appellant, in such a way that the Demand Notes by the Advocate for the Plaintiff was disqualified. According to him, the witnesses of the DW1 and DW2 surfaces prove the same. Concerning the allegations that, the Trial court erred in law and fact that, it awarded the Defendant and not the Plaintiff, and that the court awarded the Defendant something not prayed for, he submitted that, the trial Magistrate was kin in analysing every step and law, the Defendant was indeed awarded the amount claimed in his Counterclaim in his written Statement of Defense on page 3, paragraph 15, filed in the trial Court on 9 25th day of April, 2023 and the Plaintiff was served correctly, that is why she responded. On page 21 of the judgment, it was elaborated that the Court awarded what was prayed in the counterclaim. Subsequently, the appellant was not awarded because she failed to prove her case. He therefore reiterates his prayers as contained in the Written Statement of Defense, praying that this appeal be dismissed with costs, and confirms the Trial Court's Proceedings, Judgment, and Orders. Having gone through the lower court record and the submissions by both sides, I wish to start by addressing the sixth ground of appeal; in doing so, I will be guided by the principle in civil cases encompassed under section 110 of the Evidence Act, that he who alleges must prove. On this ground, the contention is that the demand note was signed under coercion. In his evidence, the respondent testified that he signed the demand notice due to fear, as the appellant and her advocate visited his area of business during late evening hours, and he was alone in the shop. To me, the allegation that he was scared is misplaced, as the records indicate that the parties were doing business on a basis of trust. Further in his entire evidence, the respondent did not prove coercion, fear, or intimidation in signing the said document. It is not explained how the appellant used police force or any other force to intimidate the respondent into signing the demand notes. Thus,

his allegation was not proven to the 10 required standard. For these reasons, therefore, this ground has merit and is allowed. Next is the combined grounds of appeal. It is not disputed that the appellant and respondent agreed to the business of supplying timber, the payment for which was to be made in installments as the supply was being received. The only issue is whether the respondent paid for the goods he received. One of the framed issues in this case was whether the respondent paid the appellant more than the claimed amount. To answer this, I would also like to peruse the plaint, which forms the foundation of the case. In her plaint, the appellant demanded that, after she supplied the goods on 9th December, 2021 and 6th January 2022 worth 30,00,000, the respondent had never paid for the same, and he never received any other cargo from the appellant. However, in her evidence, when asked about the money received after those dates, she stated that it was for the previous debt payments. This assertion relating to the earlier debts is not reflected in the appellant's plaint. It is the law; parties are bound by their pleadings. This principle was explained in the case of *Makori Wassaga v. Joshua Mwaikambo & Another* [1987] T.L.R 88, the Court stated that: 11 "A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case." Looking at the evidence and exhibits tendered especially exhibit D1 and D2, on 04/04/2023, respondent paid TZS 9,708,800/, on 22/09/2023/TZS.10,000,000/06/09/2022TZS.5,000,000,05/10/2022TZS 2,200,000,10/03/2023TZS3,000,000,06/12/2023TZS3,000,000,04/10/2022TZS4,000,000,28/11/2022TZS3,000,000,17/02/2023TZS3,000,000,02/09/2022TZS5,000,000, on 24/10/2022TZS4,100,000, on 28/08/2022 TZS10,000,000, 22/09/2022 Tsh. 10,000,000, 08/02/2023TZS4,000,000 and on 04/04/2023=9,708,800. All these were paid after 6th January 2022. Going by the allegations of the appellant in her pleading that, after 6th January, 2022, they did not continue with the business, and that the respondent has not paid 30,000,000, it is apparent that the assertion is defeated by those payments explained above. To the contrary, the respondent explained that even after the supply on 06/01/2022, they continued to do business; thus, the appellant was deceiving the court. For those reasons, therefore, as correctly found by the trial court, in proving her case, the appellant was expected to parade evidence to support what she had earlier pleaded and not to depart from her pleadings in respect of what she owes the respondent. Thus, from what is gathered in the pleadings, the appellant's oral account at trial, and the exhibits tendered in court, it appears that she fell short in her burden of proof, ultimately failing to discharge the evidential burden of proving her case on the balance of probabilities. It is my considered view that the pointed contradictions in the appellant's pleadings and oral evidence led to the conclusion that the appellant was not a credible and reliable witness. Thus, it was correct for the trial magistrate to hold that the appellant failed to prove her case to the standard required. Regarding the allegations that the respondent was awarded 43,223,608 without proving his case on the balance of probabilities, these are baseless. As explained above, the respondent was able to prove that, even after 6th February 2022, he paid the appellant the money as expressed above. It should be underscored that, in civil cases, the court always looks at the evidence that is more probable than the other. This principle was elucidated in the case of *Pauline Samson Ndawavya Vs Theresia Thomas Madaha*, Civil Appeal No 45 of 2017, CAT at Mwanza

(Unreported), where it was held that; 13 “it is a trite and indeed elementary that he who alleges has a burden of proof as per section 110 of Evidence Act Cap 6 [R.E 2002]. It is equally elementary that since the dispute was in a civil case, the standard of proof was on balance of probabilities, which means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. Weighing the evidence of the appellant and that of the respondent, it is my finding that the evidence of the respondent was more probable than that of the appellant. Thus, in my opinion, the respondent has proven that he paid the appellant an excess amount. Those explanations suffice to answer the grounds numbers 1, 2,3 and 5 of the appeal. Consequently, this appeal is dismissed in its entirety with costs. It is so ordered accordingly. Dated at Dar es Salaam on 27th March, 2025. H.R. MWANGA JUDGE. 27/03/2025 COURT: Judgment delivered at Dar es Salaam today on 27th March, 2025 in the presence of Mr. Kapwani Mbegalo, advocate for the Appellant and Sylvester Algawesa, for the respondent. 14 H.R. MWANGA JUDGE 27/03/2025 15

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