

TANZANIA / JUDGMENT

# rashid protas ndumbo vs titus zeno ndulu 2021 tzhc 9068 19 november 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (PAR ES SALAAM DISTRICT REGISTRY) AT PAR ES SALAAM PC CIVIL APPEAL NO.65 OF 2021 RASHID PROTAS NDUMBO APPELLANT VERSUS TITUS ZENO NDULU RESPONDENT (Appeal from the decision of the District Court of Kilombero at Ifakara (Hon. T.A. Kaniki, RM.^^ dated the 29^ day of March, 2021 in Civil Apoeai No. 12 of 2020

## JUDGMENT

Date of Last Order: 15/10/2021 & Date of Ruling: 19/11/2021 S.M. KALUNDE. J.: In Civil Case No. 6 of 2020 before the Mngeta Primary Court, Kilombero District, C'the trial court") the respondent, TTTUS ZENO NDULU, was the plaintiff, he sued the appellant for breach of contract. The respondent contended that, on 10^^ May, 2016, the appellant called informing him of the availability of ninety three (93) paddy bags were being sold at the price of Tshs. 100,000.00 each. An agreement was reached for the appellant to supply the consignment at the total cost of Tshs. 9,300,000.0 1 After collecting the purchase price, the appellant promised to supply the consignment by 20^ September, 2016. To the respondent's dismay, the appellant failed to supply the consignment as agreed. The appellant claimed that he incurred loss in production, as a result parties agreed the delivery of the consignment wiil be taken on 20^ August, 2017. Almost a year later. Even then the appellant failed to make delivery. A several attempts had failed, on 03" January, 2018 parties signed an agreement for deiivery of the consignment or compensate the respondent by 30"" August, 2018. Deiivery could not be made as agreed. The respondent was discounted and hence the proceedings before the trial court. In his defence, the appellant contended that he never entered into any form of agreement with the respondent for the supply of the consignment. In addition to that, the appellant denied having received any payments from the respondent in relation to the purported contract. The appellant denied taking part in the signing of the additional contract on 03"\* January, 2018 as he was not present on the respective dates^^^ At the conclusion of the trial, the trial court was satisfied that there was an agreement between the respondent and the appellant; and that the appellant was In breach of the agreement. In arriving at Its decision, the trial court reasoned that, by signing the agreement dated 03" January, 2018, the respondent was precluded, by the doctrine of estoppel, from denying that there was an agreement between the parties. In conclusion the appellant was ordered to

supply the consignment or pay Tshs. 9,300,000.00 withing sixty (60) days. Aggrieved by the decision of the trial court, the appellant, filed Civil Appeal No. 12 of 2020 before the District Court of Kllombero at Ifakara ("the first appellate court"). The grounds of appeal at the first appellate court were based on the following complaints that the trial court erred In making a finding that there was a valid contract between the parties; that the trial court was wrong In applying the doctrine of estoppel when the contract was void ab Inltio; and that the trial court failed to properly analyze and evaluate evidence hence arriving at a wrong conclusion. In the end the first appellate court was satisfied that there was a contract between the parties and that the appellant had failed t honor his obligations under the agreement and hence he was in breach of the contract. The court dismissed the appellants appeal and upheld the decision of the trial court. The appellant was still not satisfied, he has come before this Court for the second appeal trying to assert his innocence in the alleged transaction. The petition of appeal which was filed by Mr. Charles Ndaki Buzwizwi, counsel for the appellant contains four (4) grounds of appeal. His main ground of complaint against the decision by the first appellate court was that the appellate magistrate erred in holding that there was a valid contract between the appellant and the respondent when there was no proof of valid consideration. In his brave attempt to elaborate on this ground of complaint, Mr. Buzwizwi first began criticizing the first appellate court on its finding that there was a valid contract between the appellant and the respondent. His view that the alleged contract was void ab initio. He advanced the following reasons in sustenance of his submission^^ Firstly, that the contract had no effective date in that it purported to become operational before being signed by the appellant. He argued that, even if the contract was ruled to be valid, the same contravened the provisions of section 23(l)(b) of the Law of Contract Act, Cap 345 R.E. 2019 for including a matrimonial home without complying with the procedure laid down under section 59(1) of the Law of Marriage Act, Cap. 29 R.E. 2019. The counsel reasoned that, in view of the above reason, the alleged contract was void ab initio. Secondly, the first appellate court erred in upholding the decision of the trial court that there was a valid consideration. The appellant contended that the alleged contract (Exhibit T.1) did not provide what the appellant will enjoy in return upon supplying the 93 paddy bags to the respondent. In his view, in absence of such explanation, the contract was in breach of the express terms of section 25 of the Law of Contract Act (supra). Thirdly, that the appellate failed to consider that there was sufficient evidence from SU.2, SU.3 and SU.4 that they were coerced into signing the alleged contract by the court clerk. H contended that, it was improper for the respondent to use an officer of the court to solicit the signatures of SU.2, SU.3 and SU.4 who allegedly signed on behalf of the appellant. The counsel concluded that there was undue influence exerted on the signatories to the contrary to section 16(1) of the Law of Contract Act (supra). Fourthly, that Exhibit T.1 was prepared and attested by an unqualified person hence a nullity. He cited the case of AUA Industrial Group Ltd vs. WIA Group Limited, Civil Case No. 44 of 2019 (unreported). On the strength of the above grounds, the counsel invited the Court to allow the appeal and set aside the judgment and decree of trial and first appellate court. On his part, Mr. Fortunatus Masarura Maricha, learned counsel for the respondent, simply argued that the contract between the appellant and respondent met the requirements of section 10 of the Law of Contract Act (supra) hence it was valid and binding upon the parties. He added that, the writte contract was preceded

by an oral agreement between the parties as witnesses through the testimony of SM.3, the local Chairman. On the question of effective date, the counsel contended the argument was misconceived as item "C" of the contract clearly indicated that the effective date of the contract was 30<sup>th</sup> August, 2018. In relation to compliance with the provisions of section 23(1)(b) of the Law of Contract Act (supra) and section 59(1) of the Law of Marriage Act (supra) applicable to matrimonial home, the counsel argued that section 2(2) of the Law of Contract Act (supra) is clear that failure to comply with the requirement of section 59(1) does not render the contract void. On the question of consideration, Mr. Maricha contended that, through the testimony of the respondent, the trial court and first appellate court were satisfied that a consideration of Tshs. 9,300,000.00 was paid to the appellant, he also cited Exh. P.1. Responding to allegation of coercion the counsel alluded that the court clerk was not in any way a person capable coercing SU.2, SU.3 and SU.4 Into signing Exh. P.1. On the qualification of a person who prepared and attested on Exh. P.1, Mr. Maricha contended that advocate was ineligible to practice on 15<sup>th</sup> February, 2018 while the contract was executed in January,

2018. Based on the above grounds, the counsel urged the Court to dismiss the appeal with costs. In rejoining Mr. Buzwizwi reiterated his submissions in chief and cited sections 110 and 111 of the Evidence Act, Cap. 6 R.E. 2019 for an argument that the respondent failed to discharge their obligations under the respective provisions in establishing existence of the oral agreement. In the end he prayed that the appeal be allowed, so that the proceedings and decision of the trial court and that of the first appellate court are quashed and set aside. In the circumstances of the case, it is my considered view that the pressing issue in this appeal is, whether or not on the credible evidence available there was a valid agreement between the appellant and respondent. The contention by Mr. Buzwizwi in this appeal is that the first appellate court erred in holding that there was a valid contract between the appellant and respondent. The argument is premised on two arguments. First, that there was no oral contract between the parties. Second, even if there was one, the same was tainted with irregularities rendering it null and void. At the outset I wish to point out that the two courts below made concurrent findings of fact that there was a valid contract between the appellant and the respondent. I am aware of the settled position of law that a second court should very sparingly depart from concurrent findings of fact by the trial court and the first appellate court. See *Felix s/o Kichele & Another vs. Republic*, Criminal Appeal No 159 of 2005; *Joseph Safari Massay vs. Republic*, Criminal Appeal No. 125 of 2012 and *Julius Josephat vs Republic* (Criminal Appeal No.03 of 2017)

[2020] TZCA 1729;(18 August 2020)(all unreported). However, I am also aware that. In exceptional circumstances, the second appellate court may interfere with the concurrent findings of fact of the two courts below examples where there is misdirection or non-direction of the evidence occasioning a miscarriage of justice, or where there is a misapprehension of the evidence, or violation of some principles of law or procedure by the courts below. I am supported in this view by the Court of Appeal decision in *Salum Said Matangwa @ Pangadufu vs Republic* (Criminal Appeal No.292 of 2018)

[2020] TZCA 1814;(09 October 2020 TANZLII) 'We would like at the outset to state that the two courts below made concurrent findings of facts that the appellant committed the offences charged. It is trite law that, unless there has been a misdirection or non-direction of the evidence occasioning a miscarriage of justice, the second appellate court as in this case, is not entitled to interfere with such findings. Some of the Court's pronouncements in respect of this settled principle are In the cases of Mbaga Julius v. Republic, Criminal Appeal No. 131 of 2015, Nchangwa Mama Wambura v. Republic, Criminal Appeal No. 44 of 2017, The Director of Public Prosecutions v. Simon Mashauri, Criminal Appeal No. 394 of 2017 and Thobias Michael Kitavi V. Republic, Criminal Appeal No 31 of 2017 (all unreported) We shall therefore, for the purpose of determining the appeal, examine whether the courts below rightly concurred in their findings. I am mindful of the above position of law, I will examine the available records to determine whether the courts below concurred in their findings that there was a valid agreement between the appellant and respondent for supply of 93 paddy bags. I propose to respond to the above question while acknowledging that, in terms of sections 110 and 111 of the Evidence Act (supra) the burden to prove existence of a contract lies with the plaintiff. However, as was held by the Court of Appeal in Anthony M. Masanga vs. Penina (Mama Ngesi) and Others, Civil Appeal No. 118 of 2014 (Unreported) the burden is on the balance of probabilities. It is common knowledge that a contract is an agreement giving rise to obligations which are enforceable or recognized by law. For a broader understanding of circumstances of the present case, perhaps it might be prudent to consider the broader nature of contracts. According to Black's Law Dictionary, 8th Edition - "The term "contract" has been used indifferently to refer to three different things -

- (i) the series of operative acts by the parties resulting in new legal relations; (ii) the physical document executed by the parties as the lasting evidence of their having performed the necessary operative acts and also an operative fact as itself; (iii) the legal relations resulting from the operative acts, consisting of a right or rights in personam and their corresponding duties, accompanied by certain powers, privileges, and immunities. The sum of these legal relations is often called "obligation" William R. Anson - Principles of the Law of Contract" The above stated attributes may be found in an oral or parole contract. Simply put an oral contract is an agreement made with spoken words and either no writing or only partially written. An oral contract is enforceable in law if it complies with the requirements of a valid contract. In our jurisdiction, section 10 of the law of contract provides for the essential elements of a valid contract. The section reads: 'All agreements are contracts If they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void' Reading the provisions of section 10 above, my understanding is that an oral contract is enforceable if it is made by parties out of their free consent for a lawful object and consideration. Admittedly, proving an oral contract may be a daunting task, for that matter parties may consider involving witnesses for proof and future testimonial purposes; it is also advisable to create or preserve any physical evidence associated with the oral contract, such

as letters, receipts, etc.; and oral contracts may be easily proved if there is a noticeable output when its terms are implemented. All the above three aspects may be established by the court by looking at the proven and accepted history that has transpired between two parties, which allegedly made a verbal contract. In the present case, the two courts below concurrently resolved that there existed an oral contract between the appellant and respondent dated 10<sup>th</sup> May, 2017 as witnessed by a subsequent written agreement dated 03<sup>rd</sup> January, 2018. At page 7 of the typed judgment the first appellate court referred to page 5 of the trial court proceedings and observed that there was a written agreement which was tendered as Exh. T.I. Relying on 13 the contents of Exh. T.I the court concluded that there was a valid agreement between the parties. The learned trial magistrate said: "///? that consideration is clearly answered that there was a contract between the parties in the lines of the provision of Section 10 of The Law of Contract Act Cap 345 RE 2019. The appellant's allegation that he was away to Songea and never entered into such agreement with the respondent was never proved." The above findings were premised on the evidence of the respondent (SMI) who testified that on 10<sup>th</sup> May, 2016, at around mid-day the appellant (SUL) called the respondent and offered him to sell ninety three (93) bags of paddy at the price of Tshs. 100,000.00 each. Subsequently, an agreement was reached for the appellant to supply the consignment at the total cost of Tshs. 9,300,000.00. The appellant went to the respondent's office and collected the money. In his testimony in cross-examination, SMI admitted that when the contract was being transacted there were no witnesses. He said ^^Hakukuwa na mtu wakati natoa fedha, nilikuaminry^^ 14 According to SMI the consignment was to be supplied by 20<sup>th</sup> September, 2016. The appellant failed to supply the consignment on the agreed date he promised to supply him on 20<sup>th</sup> August,

2017. No delivery was made, as a result on 03<sup>rd</sup> January, 2018 parties signed an agreement for delivery of the consignment or compensate the respondent by 30<sup>th</sup> August, 2018. Delivery could not be made as agreed. The respondent was aggrieved and hence the proceedings before the trial court. The appellant strongly challenged the existence of either of the agreement, be it oral or written. His line of argument was that the trial court and first appellate court erred in holding that consideration had passed from the respondent to the appellant. He also argued that the agreement dated 03<sup>rd</sup> January, 2018 (Exh. T.I) did not stipulate what the appellant will enjoy in return upon supplying the 93 paddy bags to the respondent. In his view, in absence of such explanation, the contract was in breach of the express terms of section 25 of the Law of Contract Act(supra).,^^ 15 Upon examining the records, I have noted that, indeed, Exh. T.I is silent or did not provide for a consideration on the part of the appellant. Further to that, it is on record that, the respondent did not tender any evidence or proof of payments to the appellant. He also admitted that there was no person or witness when the consideration was being paid. Thus, besides SMTs mere allegations that he made payments to the appellant, there was no evidence or at least proof of the course of conduct which was presented before the court to substantiate that consideration had passed from the respondent to the appellant and hence validating the verbal and written agreement. In absence of proof that consideration passed from the

respondent to the appellant, it cannot be said that there was offer and acceptance supported by furnishment of consideration. The respondent had a duty to establish his claim before the trial court. In absence of proof or evidence of payment of the agreed contract price raises serious doubts on the existence of a very fundamental element of a valid contract, that is consideration. In absence of proof of consideration, it cannot be safely conclude 16 that there existed a valid agreement between the appellant and respondent. The above ground alone Is sufficient to dispose of the appeal. However, I wish to comment on the lapses and complaints In the manner In which the agreement dated 03<sup>rd</sup> January, 2018 (Exh. T.1) was executed. Firstly, the appellant contended that he did not sign the agreement. Secondly, It was argued that the agreement was not executed before the advocate as It purports, instead parties signed separately In the absence of the advocate and on different dates. Thirdly, the appellant contended that his relatives were coerced Into signing the agreement by a court clerk and that the agreement was signed In the absence of the appellant see the testimonies of SU.2, SU.3 and SU.4. It Is on records that SU.2, SU.3 and SU.4 testified on oath that they were told to sign the agreement by a court clerk and that they did so at home not in front of an advocate as alleged by the respondent. The witnesses also said that the signed the agreement In absence of the appellant<sup>16</sup> It is also on record that, SU.2, SU.3 and SU.4 were not cross examined or their evidence on this aspect shaken during cross-examination. It is well settled that, as a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. (See Cyprian A. Kibogoyo vs R, Criminal Appeal No. 88 of 1992, Paul Yusuf Nchia vs. National Executive Secretary, Chama Cha Mapinduzi and Another, Civil Appeal No. 85 of 2005 (all Unreported). In view of the above evidence, it is doubtful whether the agreement was signed before the advocate in the presence of the appellant and his witnesses. The fact that an officer of the court was used to facilitate the signing of the agreement was not refuted in evidence. The above issues cast doubts on validity of the agreement between the parties as was concluded by the trial courts and the first appellate court. Under the circumstances I am satisfied that if the trial court and the first appellate court had considered or taken into account the above piece of evidence, they might have arrived at a separate conclusion. In the final event, I am convinced that th 18 two courts below misdirected themselves on the evidence relating to the presence of a valid contract between the respondent and appellant. The misdirection or non-direction by the two courts below occasioned a miscarriage of justice sufficient for this court to interfere in the decisions of the two courts below. For the foregoing reasons, I find merit in the appeal. I consequently, allow it with costs. The decisions of the Mngeta Primary Court and Kilombero District Court are quashed and any subsequent order thereby is set aside. DATED at MOROGORO this 19<sup>th</sup> day of November, 2021. 4- :2- > 'cm— S.M. KALUNDE JUDGE 19

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