IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 219 OF 2018

LEONARD DOMINIC RUBUYE t/a
RUBUYE AGROCHEMICAL SUPPLIES ..... APPELLANT

VERSUS

YARA TANZANIA LIMITED ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Mruma, J.)

dated the 26th day of June, 2018
in
Commercial Case No.29 of 2016

JUDGMENT OF THE COURT

9th February, 2022 & 13th July, 2022

LILA, JA:

The appellant and Rubuye Agro Business Company (then 2nd Defendant) who is not a party to this appeal were jointly sued before the High Court of Tanzania (Commercial Division) by the respondent claiming for, among others, breach of contract and payment of TZS 727,346,800.46 being unpaid balance arising from fertilizers supplied and delivered to them. Rubuye Agro Business Company was found not being privy to the agreement hence no liability could arise against them.

That resulted in being discharged from liability. The appellant was found to have breached the contract and was condemned to settle the debt, pay interest and costs. The decision aggrieved him, hence the present appeal.

The appellant and the respondent have been in a long time business relationship. The respondent supplied, upon request by the appellant, various kinds of fertilizers. The practice was that the appellant issued Local Purchasing Orders (LPOs) to the respondent who, upon delivery of the requested consignments, raised invoices for payments. Delivery of the goods was either in Dar es Salaam or Njombe warehouses and was signified by issuance of Delivery Notes (DNs). Trucks authorised by the appellant were used to collect the consignments. Payment for fertilizers delivered was either through Tanzania Interbank Settlement System (TISS) or direct internal transfers from NMB Bank to the respondent's account. Come March, 2015, the respondent conducted an audit on the appellant's account and realised that the appellant had defaulted payment of the purchase price to the tune of TZS 847,346,800.00 which, upon sending to him a demand notice, payments were made totalling TZS 120,000,000.00, leaving TZS 727,346,8000.00 unpaid. This prompted the respondent to institute

Commercial Case No.29 of 2016 before the High Court of Tanzania (Commercial Division) alleging that the appellant had, by such default, breached the contract and claimed payment of the outstanding debt, damages, interest and costs.

The respondent's claims were strongly disputed by the appellant and the then 2nd defendant in their joint written statement of defence in which they asserted that not all the fertilizers were ordered, dispatched and delivered to them and further that all claims for the otherwise supplied fertilizers were settled and, to verify so, asked for a reconciliation of the accounts. They claimed that through TISS, a total of TZS 539,958,000.00 was paid and later TZS 120,000,000.00 was paid making the total amount paid to be TZS 659,958,000.00 besides other payments.

The High Court (Mruma J.), at the conclusion of the trial, apart from exonerating the then 2nd defendant from liability holding that she was not a party to the arrangements between the parties herein, found the claims established against the appellant and ordered payment of the claimed amount with interest at 16% per annum from the time of instituting the suit to the date of full payment and at court's rate from the date of judgment to the date of full payment. He also awarded costs

to the respondent. Aggrieved by the decision, the appellant preferred the present appeal.

Before the High Court, the respondent's case rested on two witnesses, namely; January Fabian (PW1) and Hillary Dickson Pato (PW2) who filed their respective witness statements ahead of the hearing date. They introduced themselves respectively, as being Head of Accounting and Reporting and Head of Marketing and Distribution of the respondent. Apart from their witnesses' statements, they also featured in court to testify. Common in their testimonies is that the parties were engaged in business relationship whereby the respondent supplied the appellant with fertilizer as and in accordance with the LPOs after which an invoice was raised by the former for the latter to pay. Delivery was done to trucks' drivers instructed by the appellant at either Njombe or Dar es Salaam warehouses. The respondent claimed that it was a term of their agreement that payment of the supplied fertilizers was to be done within thirty (30) days of the delivery of the consignment. However, in May, 2014, the respondent realised that a total amount of fertilizers worth TZS 897,346,800.46 remained unpaid which prompted them to write a reminder to the appellant to clear the debt. PW1 also alleged that the appellant, through his letter and e-mail

correspondences, not only admitted being indebted to the respondent, but also promised to pay it following which TZS 50,000,000.00 was paid thereby reducing the debt to TZS 847,346,800.46. The debt was later reduced by payment of TZS 120,000,000.00 thereby remaining an outstanding balance of TZS 727,346,800.46, the subject matter of the suit.

In the course of his testimony, PW1 tendered various invoices together with LPOs, DNs and some weigh-bridge receipts as exhibit P1 collectively and a list of paid and unpaid invoices (exhibit P2). According to PW1's witness statement found at page 440 of the record of appeal, the unpaid invoices were singled out to be those bearing Nos. YTZ009270, YTZ009283, YTZ009319, YTZ009322, YTZ009327, YTZ009360, YTZ009376, YTZ009383, YTZ9389, YTZ009412, YTZ009544, YTZ009608, YTZ009654, YTZ009830, YTZ009948, YTZ009993, YTZ010136, YTZ010256, YTZ010292, YTZ010379, YTZ010381, YTZ010408. During his testimony in court, he tendered invoices, DNs and LPOs (exhibit P3) which he claimed were not paid for by the appellant. Discussion on the relationship between the list of unpaid invoices above and exhibit P3 will come later. Suffice it to state here that, in law, only the listed unpaid invoices constituted the pleaded

claims by the respondent. PW1's evidence was substantially supported by PW2 regarding the parties' business relationship and the outstanding debt.

For the appellant's side, it was only the appellant (DW1) who testified. In both his oral evidence and witness statement lodged, he admitted having a business relationship with the respondent based on supply of fertilizer upon placing an order after which, as opposed to what PW1 stated, he effected payments as and when he sold the fertilizer. As shown above, he denied being indebted to the respondent claiming that he paid all the claims. Detailing how the payments were made, in his witness statement, he stated thus:-

> *"11. That further to my testimony and deposition in paragraph 10 above, results thereof confirmed at NMB Bank that indeed twelve payment instructions by way of the second defendant's agricultural vouchers totalling TZS 335,430,000/= were made in favour of the plaintiff between 26/08/2013 to 30/10/2013.*
>
> *12. I add and to be precise, the following funds transfer payments in TZS were directly made to the plaintiff through the second defendant's agricultural vouchers scheme benefits with respective dates in brackets thus 720,000/=*

(26/8/2013), 2,130,000/= (28/8/2013), 1,410,000/= (29/8/2013), 3,930,000/= (2/9/2013), 2,160,000/= (4/9/2013), 50,640,000/= (6/9/2013), 96,900,000/= (9/9/2013), 17,310,000/= (10/9/2013), 29,430,000/= 11/9/2013), 74,880,000/= (28/10/2013, 44,220,000/= (29/10/2013 and 12,510,000/= (30/10/2013) thereby totalling TZS 335, 430,000/=."

He tendered the Transfer Requests Nos. 0108253, 0064578, 024687, 0132448, 019219, 93301, 019303, 0132518, 019693, 52008, 520020 and 018273 and were admitted as exhibit D2 collectively. To verify that the money was deducted from the appellant's account, DW1 tendered the NMB Bank letter dated 29/3/16 and the plaintiff's letter to them as exhibit D3.

Having made the aforesaid payments and following the respondent's demand for payment of TZS 727,346,800.46, the appellant claimed that he unsuccessfully asked for a reconciliation of accounts with the respondent as reflected in their letter exhibit P6. Besides, in his witness statement, he disowned various LPOs and the respective amounts claimed for want of proof of authorisation and delivery to them of the respective consignments of fertilizers. Under that category are

LPOs Nos. 00730 (TZS 30,000,000.00), No. 00731 (TZS 33,990,000.00), No. 00739 (TZS 5,635,000.00), No. 00740 (TZS 30,960,000.00), No. 00736 (TZS 33,507,000.00), No. 00742 (TZS 26,350,000.00), No. 00745 (TZS 39,454,600.00), No. 00742 (TZS 2,600,000.00), No. 00749 (TZS 40,568,800.00), No. 01453 (TZS. 31,039,000.00), No. 01451 (TZS 42,240,000.00), No. 01455 (TZS 32,550,000.00), No. 01475 (TZS 29,440,000.00), No. 01479 (TZS 58,880,000.00), No. 01485 (TZS 58,880,000.00), No. 01496 (TZS 32,760,000.00), No. 01476 (TZS 32,280,000.00), No. 01500 (TZS 31,960,000.00), No. 1499 (TZS 25,640,000.00), No. 00658 (TZS 114,000,000.00)

When DW1 was cross-examined on the outstanding balance, he denied the claims on the ground that no reconciliation of the accounts was done. As for the modality of payment, he stated at page 616 of the record of appeal that:-

> *"It is true that we were taking fertilizers on credit. We were paying to the supplier's Account much as we sell. I would pay after the invoice has been issued..."*

In disparaging the contention that payment was required to be made within 30 days after delivery of fertilizer, DW1 claimed that there

was a written agreement showing terms of payment and everything. He did not, however, produce any in court.

In his determination of the suit, the learned trial judge addressed at length the issue whether the claim for the outstanding liability was sufficiently proved. He was, at the end, of the view that the evidence by PW1 was supported by PW2 and in evaluating the evidence by both sides, he stated at page 1007 of the record of appeal that:-

> *"The witness tendered in evidence exhibit P1 which is a bunch of documents containing Defendant's local Purchase Order, Weighbridge Certificates, delivery Notices and Tax invoices for transactions done mostly in 2013. He also tendered in evidence statement of account of the 1st Defendant (exhibit P2). In exhibit P2 it is shown that the 1st Defendant didn't pay for supplies made under the listed Local Purchase orders in exhibit P1. For instance in Local Purchase Order No. 00740 the amount stated tallies with that which is stated in Statement of Account (exhibit P1). The amount indicated in both documents is Tshs 30,960,000/=. There is also Local Purchase Order No. 0744 in which Tshs 5,112,000/= is claimed, Local Purchase Order No. 0742 for Tshs 26,350,000/=, Local*

Purchase Order No. 0736 for Tshs 33,507,000/=, Local Purchase Order No. 01455 for Tshs 32,550,000/=, local purchase Order No. 01453 for Tshs 31,039,000, Local Purchase Order No. 01476 for Tshs 33,280,000/=, Local Purchase Order No. 0419 for Tshs 60,000,000/= and other purchase orders which were tendered as exhibit P3. In all these Purchase Orders there are corresponding delivery Notices and Tax Invoices."

As for the appellant who claimed to have paid monies in excess of the respondent's claims exhibited in the invoices hence not indebted to the respondent, the learned trial judge went on to state at pages 1008 to 1009, in part, that:-

"At the end of that testimony, PW1 was asked questions on whether or not local Purchase Orders indicate the person who received goods delivered which he answered in the negative. He was not asked any single question on the genuiness or otherwise of Purchasing Orders and Tax Invoices in exhibits P1, P2 and P3.

On the other hand the defendant didn't lead any evidence to controvert the said Local Purchase Orders, Delivery Notices and Tax Invoices as tendered by PW1. Similarly no evidence was

available to show that the defendants paid the outstanding balance after the Demand note of 23rd March 2015 which indicated that the outstanding balance was Tshs 847,376,800.46 which the defendants acknowledged in their letter to the plaintiff dated 4th April 2015 (exhibit P6). If the defendant payments of Tshs 539,958,000/= allegedly made prior to March 2015 were for liquidation of the said outstanding balance of Tshs 847,376,000.45 that would have been indicated in exhibit P6. The fact that the said payments are not stated in that letter is evidence that the amount demanded in 23rd March 2015 letter did consider all payments made before that date which means that the amount was actually pending."

Convinced that the claims were proved, the learned trial judge entered judgment in favour of the respondent. The appellant was thereby ordered to pay the respondent TZS 727,346,800.46, interest on the decretal amount at 16% per annum from the time of instituting the suit to full payment and an interest at court rate from the date of judgment to the date of full payment and costs.

The finding by the High Court aggrieved the appellant who now seeks to fault the learned trial judge on a seven grounds of grievances

memorandum of appeal after ground 8 was dropped by the appellant's counsel. The seven points may, however, be categorised into two groups thus:-

1. The High Court was not properly constituted for failure to involve assessors or expressly dispense with them. Here we have in mind ground 1 of appeal.
2. The finding in favour of the respondent was unjustified. Relevant here are grounds number 2, 3, 4, 5, 6 and 7.

Mr. Dickson Mtogesewa, learned counsel represented the appellant and Mr. Ayoub Mtafya, also learned counsel represented the respondent before us during the hearing of the appeal. Both counsel filed written submissions in terms of, respectively, Rules 106(1) and (7) of the Tanzania Court of Appeal Rules, 2009 ahead of the hearing date which they fully adopted as part of their submissions and clarified some few issues. We have formed the view that instead of reciting their respective elaborate arguments both oral and written, we should refer to them in the course of the judgment whenever we shall find them relevant and compelling.

Before we dwell onto considering the grounds of appeal, we wish to put some few things in its proper perspective. Upon our serious

examination of the evidence on record of appeal including exhibits P1 and P3, we have realised that the invoices in exhibit P1 indicated payment due date which in effect was one months' time after issuance of the invoices as was claimed by PW1. There was, however, no indication, even for the paid invoices, that there was compliance with that condition in any of the claims raised. To the contrary what we have noted is that there were simply payments effected for some of the invoices. In the circumstances, we see no reason to disagree with the evidence of DW1 that payment for the supplied fertilizer was being effected according to sales. The more so, neither of the parties produced in court as evidence the alleged written agreement regulating the parties' business relationship to support its side of the case. Even DW1 who claimed existence of such agreement did not do so. But having read the evidence by both sides as a whole, it seems clear to us, as we shall demonstrate a little later, that there existed a contract of sale of goods between them which was based on exchange of documents. Whereas the respondent supplied various kinds of fertilizers to the appellant upon issuing LPOs, the appellant loaded the fertilizers in trucks engaged by him and it was the drivers of the respective trucks who signed the delivery notes. The LPOs and DNs were received as exhibit P1 collectively. It is also a fact that the LPOs did not show the

names of truck drivers and that, upon delivery of fertilizers to the trucks' drivers, it was upon the appellant to trail the trucks up to his stores.

Although neither of the parties produced a written agreement and much as the trial judge did not bother to make a finding on the nature of the agreement between the parties, it is trite that terms of any contract may be deduced from the conduct of the parties and the nature of transactions made between them. The evidence by the parties, in no uncertain terms, shows that the respondent supplied the fertilizers to the appellant upon request (an order being placed) and then raised an invoice requiring the appellant to pay and actually paid. The issue that was before the High Court was whether the appellant paid for all the fertilizers supplied. Plain as it is, the parties were involved in supply of goods upon demand on the one hand and then payment by the other upon an invoice being raised by the supplier. Such a business relationship is governed by the Sale of Goods Act, Cap. 214 R. E. 2002 (now 2019) (the SGA). To be specific, the provisions of section 3(1) of the SGA are very relevant here. The section stipulates that:-

> *"3 (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called price, and there may be a*

contract of sale between one part owner and another."

In the circumstances that obtained in the present case, it is ludicrous to hear any of the parties contending that there was no contract between them and the terms thereof simply because there was no written contract for, in law, it is not necessary that an agreement should be in a written form. We are reinforced in this view by the provisions of section 5 (1) of the SGA, which states:-

"5 (1) Subject to the provisions of this Act and or any other written law in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties."

The conduct of the parties and the transactions involving the parties, in the present case, meant that there existed an oral contract of sale of fertilizers between the parties [See **Engen Petroleum (T) Limited v Tanganyika Investment Oil and Transport Limited**, Civil Appeal No. 103 of 2003 (unreported)]. Any conduct adversely affecting or frustrating the transactions amounted to a breach of contract. As stated above, the respondent claimed that the appellant failed to pay for some of the supplied fertilizers valued at TZS.

727,346,800.46 hence breached the contract which claim was vehemently disputed by the appellant. We shall address the issue later in this judgment.

In ground one (1) of appeal, the appellant complained that the High Court was not properly constituted for conducting the trial of the suit without the aid of assessors or an express waiver thereof. The legal hooks on which the appellant sought to hang his arguments are the provisions of Rule 51(1) of the High Court (Commercial Division) Procedure Rules, 2012 (the Com Rules). After citing Order XVIII Rule 1A and Order XX rule 3A & B of the Civil Procedure Act, Cap. 33 R. E. 20002 (now R. E. 2019) (henceforth the CPC) which have provisions which enacted the requirement of the trial judge in the High Court (Commercial Division) to sit with assessors; it is the appellant's contention that in the absence of assessors, the trial court was not properly constituted a defect which vitiated the trial. In reply, the respondent argued that in terms of Rule 2(1) and (2) of the Com Rules, the CPC applies in trial of suits in the Commercial Court only where there is a lacuna in the Com Rules which is not the case on issues about assessors. He also submitted that Rule 51 leaves it at the discretion of

the trial judge to involve assessors only when he finds it necessary hence he cannot be faulted for not involving them.

Without any hesitation, we agree with the appellant that the cited provisions of both the Com Rules and the CPC enact the requirement for the judge to sit with assessors but the application of the provisions of the CPC adjudicating cases in the Commercial Court is restrictive and limited to situations where there is a lacuna in the Com Rules. Rule 2(2) of the Com Rules is explicitly clear on that. Further, looking at the manner Rule 51 of the Com Rules is couched in respect of involvement of assessors during the trial of a suit, we note that there is no significant lacuna calling for invocation of the provisions of the CPC in that respect. It is self-sufficient and in this appeal the appellant has failed to demonstrate any lacuna in the Com Rules that could have prompted the trial judge to resort to the provisions of the CPC. That said, we can now proceed to determine the issue whether the trial court was properly constituted when it heard and determined the suit.

The record is vivid that the trial of the suit proceeded without the aid of assessors. There was, also, completely no mention of assessors and whether or not it had dispensed with them as rightly submitted by the appellant's counsel. Was that fatal? To resolve the issue, a serious

examination of the import of the provisions of Rule 51(1) of the Com Rules is inevitable. The Rule provides:-

> *"51 - (1) Where the trial judge finds it necessary that the trial of a suit shall be conducted with the aid of assessors, the court shall summon assessors from a list submitted by the Commercial Court users Committee."*

Given the wording of the Rule, it is plain that use or non-use of assessors in a trial of a suit is a matter left to the discretion of the trial judge to determine. We are of a considered view that generally the Rule imposes a duty on the presiding judge to peruse the pleadings before him so as to decide whether or not the issues involved and which may arise during the trial of the suit would require any inputs from assessors so as to arrive at a just decision. That is cognizant of the fact that the assessors permitted to be involved in the trial are only those who are knowledgeable of the field on which the suit is founded (see Rule 51(3) of the Com Rules). That notwithstanding, Rule 51 of the Com Rules left it at the prerogatives of the presiding judge to determine whether or not assessors should be involved in the trial even without necessarily involving the parties. Where he considers it unnecessary, then he would

not direct summons be issued to them and vice versa. As the law now stands, the decision and or choice is left at his absolute discretion.

Read closely, the appellant's complaint is grounded on the failure by the trial judge to indicate, on the record, that he saw no need to involve assessors. Admittedly, that might be proper in terms of transparency, but it is not the requirement of the law. On this basis, we are of a settled view that by not ordering summons to be issued, the trial judge decided not to involve the assessors in the trial of the suit. After all, the appellant did not suggest or indicate how that omission prejudiced him and we see none. In the final analysis we find the complaint unfounded and we dismiss it. This takes us to the second ground of complaint.

In ground two (2) of appeal, the learned trial judge is basically being attacked for making a finding that the respondent had established the claims. It is contended that he failed to properly evaluate the statement of account (exhibit P2) and other evidence on record as a result of which he wrongly found that it exhibited the appellant's default and hence the suit for indebtedness of TZS 727,346,800.46 contrary to its accounting evidence. It is the appellant's submission that the trial judge relied on the supplies made by the respondent as per exhibit P2 to

determine the appellant's liability in the exclusion of the payments made by the appellants. It is his further contention that, in exhibit P2 there is a total of TZS 1,765,978,700 unaccounted money deposited by the appellant in the respondent's account with no reciprocal delivery notes and invoices and there was a further TZS 879,279,701.54 as opening balance by 27/01/2013 which was not supported by delivery notes and invoices making accumulative credit deposit of TZS 2,552,236,700.00. Not surprising therefore, before us, Mr. Mtogesewa argued that the appellant paid more than he was supposed to. To verify that, Mr. Mtogesewa argued, the appellant through their letter exhibit P6 requested for reconciliation of the accounts which was however turned down by the respondent through a demand letter (exhibit P4). For this reason the appellant sought indulgence of the Court to step into the shoes of the trial High Court and re-evaluate or reconsider the evidence particularly exhibit P2 and establish the appellant's actual liability to the respondent.

Mr. Mtafya was of a different view. He refuted the appellant's contention that exhibit P2 formed the sole base for the learned trial judge's findings. To the contrary, he submitted that exhibits P1, P2, P3, P5 and P6 of the respondent's side and exhibits D2 and D3 were

considered by the learned judge in arriving at the conclusion that the appellant is liable. He submitted that in exhibit P4, the respondent acknowledged payment of TZS 5,719,354,700 which reflected their earlier or past supplies and payments made and indicated that there was an outstanding balance of TZS 847,346,800.00 by 23/3/2015 which, after the subsequent payment of TZS 120,000,000.00 the liability remained to be TZS 727,346,800.46 which amount was not disputed by the appellant in his reply letter to the demand notice (exhibit P6) and reply e-mails by the respondent (exhibit P5). In the upshot, the respondent contended that the appellant admitted the liability. Based on the above evidence, the respondent was not in favour of the view that the Court should re-evaluate the evidence and come up with its own findings.

The pertinent issues the appellant has raised in this ground of appeal are whether the learned trial judge properly evaluated the evidence by both sides and whether his findings were justified. In answering these issues we shall start by citing a few authorities expounding the legal positions which shall form the basis of our determination.

We begin by acknowledging the well settled position that the onus of proving existence of any fact lies on the party asserting its existence and in civil cases proof is at balance of probabilities. That is in accordance with the provisions of sections 110 and 111 of the Law of Evidence Act [CAP 6 R. E. 2019]. See the case of **Attorney General and two Others v Eligi Edward Massawe and Others, Civil Appeal No. 86 of 2002** (unreported). Of course, this is construed to mean that the one with heavier or stronger evidence will have the case decided in his favour. Applying this principle to the matter at hand, it was therefore upon the respondent to lead evidence to the effect that fertilizers worth the suit amount was actually ordered by the appellant, delivered to him, a claim for payment (invoice) was raised and that the appellant did not honour it by effecting payment for the same. Having already held that the contract was based on exchange of documents, such a claim by the respondent required to be substantiated by production of documentary evidence. In that accord, the trial judge ought to have satisfied himself that there was such evidence from the respondent.

As shown above, it is evident that while the respondent produced what the learned trial judge termed them as a "bunch of documents"

comprising invoices accompanied with the LPOs and DNs and a statement of account of the appellant (exhibit P2), the learned trial judge had an eye on only a few of the LPOs, DNs and invoices in exhibits P1 and P2 and out of that sample he concluded that the claims were proved. We do not think that such an approach was proper in the circumstances of this case. The same way the respondent bore the duty to prove each and every claim constituted in each transaction, the learned trial judge was equally obligated to satisfy himself that such duty was sufficiently discharged by examining each transaction. In contracts of this nature where there were various orders and of different amounts no one transaction may be taken to represent another or the rest of the transactions. The manner the trial judge treated the evidence before him could not guarantee him of not occasioning an injustice particularly on the quantity of the fertilizers actually ordered and delivered, on the one hand, and the validity of the amount claimed, on the other hand.

As a first appellate court and in situations of this nature, we have the power under Rule 36(1)(a) of the Rules to revisit and re-evaluate the entire evidence in an objective manner and come up with our own findings of fact. (See **Siza Patrice v Republic,** Criminal Appeal No. 19

of 2010 cited in **Kaimu Saidi v Republic**, Criminal Appeal No. 391 of 2019 (both unreported) and **Pandya v R** (1957) EA 336). Exercising our mandate, we accordingly step into the shoes of the trial High Court so as to reconsider the evidence availed in an attempt to satisfy ourselves on how the figure claimed was arrived at.

We have examined each of the 42 items in exhibit P2 which the respondent claimed to have not been cleared by the appellant (unpaid invoices). In the first place, it is clear that this list formed the basis to the respondent's claims. Secondly, we have noted that it is not in harmony with the list of unpaid invoices singled out by PW1 in his witness statement in which he itemised 22 invoices only as shown above. That notwithstanding, documents supporting unpaid claims were tendered as exhibit P3 collectively. These are, in law, the ones which shall form the basis of our determination of the appellant's liability. In saying so, we are alive to the settled law that documents not tendered and admitted in court as exhibits cannot be relied upon as evidence and cannot be the basis of a decision. There is a plethora of precedents to this affect. To mention few are; **Japan International Corporation Agency (JICA) v Khaki Complex Limited** [2006] TLR 343, **Abdalla Abass Najim v Amini Ahmed Ali** [2006] T.L.R. 55; **Shemsa Khalifa**

and 2 Others v Suleiman and **Hamed Abdalla**, Civil Appeal No. 82 of 2012 (unreported). Similarly, documents, although tendered in court, if no explanation is availed as to its purpose are of no assistance to the court. The duty lied on the party relying on them to demonstrate their significance. That said, much as we appreciate that a bunch of documents were tendered in court (exhibit P1), there was need for explanation as to their relevance. We shall therefore not consider any document falling under those categories. Instead, we shall examine whether exhibit P2 is supported or substantiated by exhibit P3 which comprises of documents duly tendered and evidence led that is to say; if the unpaid invoices in exhibit P2 are supported by Local Purchasing Orders (LPO) and Delivery Notes (DO). Upon doing so, we have realised that Invoice No. YTZ010292 for TZS 33,280,000.00 is fully supported by LPO No. 01476 and a DO; Invoice No. YTZ10136 for TZS 58,880,000.00 is fully supported by LPO No. 01485 and a DO; Invoice No. YTZ009376 for TZS 39,503,000.00 is fully supported by LPO No. 00745 and a DO; Invoice No. YTZ009327 for TZS 363,000.00 is fully supported by LPO No. 00745 and a DO; Invoice No. YTZ010256 for TZS 32,760,000.00 is fully supported by a LPO No. 01496 and a DO; Invoice No. YTZ010381 for TZS 31,960,000.00 is supported by LPO No. 01499 and a DO; Invoice No. YTZ009322 for TZS 5,112,000.00 is fully supported by LPO

No. 00744 and a DO; Invoice No. YTZ09319 for TZS 15,650,000.00 is supported by LPO No. 00742 and a DO; Invoice No. YTZ009283 for TZS 33,507,000.00 is supported by LPO No. 00736 and a DO; Invoice No. YTZ009703 for TZS 40,568,800.00 is not in exhibit P2 and in PW1's witness statement; Invoice No. YTZ010261 for TZS 29,440,000.00 is not in exhibit P2 and in PW1's witness statement; Invoice No YTZ009360 for TZS 39,454,600.00 has no LPO; Invoice No. YTZ009947 for TZS 32,550,000.00 is not in exhibit P2 and in PW1's witness statement; Invoice No. YTZ010302 for TZS 58,880,000.00 00 is not in exhibit P2 and in PW1's witness statement; Invoice No. YTZ009841 for TZS 31,039,000.00 is not in exhibit P2 and in PW1' witness statement; Invoice No. YTZ009270 for TZS 30,960,000.00 is fully supported by LPO No. 00740 and a DO and lastly, Invoice No. YTZ009904 for TZS 42,240,000.00 is not in exhibit P2 neither in PW1's witness statement. It is significant to also note that the LPOs had the appellant's official stamp affixed on them proving that they originated from the appellant.

In view of the nature of the contract between the parties as demonstrated above, the LPOs, DNs and Invoices are crucial documents in proving that the goods (fertilizers) were ordered, delivered and a claim for payment was made the absence of which adversely affects the

claimant's case. Once there is no LPO and a DN it means no order was placed by the appellant and there was no delivery of the fertilizers hence no claims may arise (no invoice can be issued) on that particular consignment. Further to that, no liability on the part of the appellant would also arise where the invoice is not raised. Production of these documents in court as exhibits was, in particular case, indispensable in substantiating the claims [See **Engen Petroleum (T) Limited v Tanganyika Investment Oil and Transport Limited** (supra)]. In a like oral contract of sale of petroleum which was founded on exchange of documents, no invoices and delivery notes were produced to prove that petroleum products supplied to the respondent were not paid for and the Court held that the claims were not sufficiently proved. By analogy, in our present case, no claim would also arise where a certain invoice is listed as unpaid invoice in PW1's witness statement but was not among those listed by the respondent in the list of unpaid invoices in the plaint and in exhibit P2 as, it is trite law, that they shall be caught up in the web of unpleaded claims (invoices) in the plaint for which courts are barred from considering and granting the reliefs thereof. Claims falling under those categories, as indicated above, are in respect of Invoices Nos. YTZ009703 for TZS 40,568,800.00, YTZ010261 for TZS 29,440,000.00, YTZ009947 for TZS 32,550,000.00, YTZ010302 for TZS

58,880,000.00, YTZ009841 for TZS 31,039,000.00 and YTZ009904 for TZS 42,240,000.00. We hold them not to have formed part of the claims hence cannot form part of the appellant's liability. The effect of this is that they reduce the respondent's claims to the extent of their total, which is TZS 234,717,800.00 which we hold to have not been proved. The appellant's liability, based on the documents tendered as exhibit P3 and which we have satisfied ourselves that it was sufficiently proved stands at TZS 281,975,000.00 only.

This brings us to another pertinent issue calling for our resolve whether the appellant cleared the aforesaid amount. Both before the High Court and before us through the learned counsel, the appellant claimed to have paid more than was due.

We shall start our discussion with whether the appellant admitted to the respondent's claim of TZS 847,346,800.46 alleged in the demand letter (exhibit P4) by his reply letter (exhibit P6) dated 04th April, 2015. Plain as exhibit P4 is, it cannot be taken to have been an unequivocal admission of the claim. We let the relevant part of it tell it all:-

> *"...We acknowledge receipt of your letter dated 23rd, March 2015 regarding the outstanding amount TZS 847,346,800.46/=.*

Nevertheless we now trade as Rubuye Agrobusiness Co. Ltd, and since the receipt of the aforementioned letter we have made payments of TZS 120,000,000/= to Yara Tanzania Ltd Account.

Meanwhile we request the following;

1. ***Reconciliation of Account***
2. *There should be no interest of 2%*
3. *Yara Tanzania Ltd to allow loading of fertilizer in the sense that, upon deposit of particular amount to Yara Tanzania Ltd account, half of the said amount to honour the outstanding balance while the other half be cash payments for the new order...."* (Emphasis added)

It is discernible that the appellant simply acknowledged receipt of the demand Notice (exhibit P4) and indicated that he had made some payment to reduce the liability. There would definitely be no need to ask for reconciliation of account if there was nothing disturbing him about the validity of the claim. That request, which the appellant has maintained all along, suggested nothing but doubts on the amount claimed as opposed to the thinking that he had admitted the whole claim. Whilst that is the case, the record of appeal at page 589 bears out that when he was cross-examined by Mr. Mtogesewa on 8/5/2017,

the appellant admitted in court that reconciliation was made. Such assertion defeated his earlier request for reconciliation of accounts. But there was no follow up question whether or not the reconciliation came up with the amount claimed. We accordingly hold that the appellant admitted liability save for the extent which we have determined above.

We now revert to the substantive issue whether the appellant discharged his duty of paying for all the fertilizers supplied. In answering this issue, we shall also determine the appellant's complaint that the judge did not accord due weight to his defence. We have seriously examined the appellant's testimony that he effected payments through the defendant's agricultural voucher scheme and directly into the respondent's bank account and he tendered the Transfer Requests in court as exhibit D2. Given the fact that the respondent had denied receiving any payment from the appellant's end in either of the ways contended by the appellant, the burden shifted to the appellant to prove the respondent wrong as was rightly observed by the learned trial judge. Like the trial judge, we are of the considered view that transfer requests and the oral contention that payments were made, in the circumstances of this case, was not enough to prove actual payments. As the transfer requests were made to the NMB BANK, then the issue

remained whether they were honoured and the said money was actually transferred into the respondent's account. Production of a bank statement of either the appellant or the respondent reflecting respectively such money transfers or any other payments done and credited into the respondent's account was crucial. In effect, that was the gist of the letter from the NMB to the appellant (exhibit D3). It was not proof of payment as contended by the appellant but a request to the appellant to urge the respondent obtain a Bank Statement so as to verify the payments done as per his request. At its bottom, it states that:-

> *"Hivyo unaombwa kuwasiliana na mhusika wa YARA TANZANIA LIMITED awasiliane na Tawi la NMB lililo karibu naye achukue Banki Statement yake na kuhakiki malipo hayo kama yalivyoorodheshwa hapo juu kwa tarehe zake za malipo..."*

Unfortunately, there is no evidence that the appellant heeded to the NMB's request and what was the response from the respondent's end. In the absence of such evidence we hold that he did not do so. Otherwise, in our view, the defendant's own bank statement reflecting such transfer and deposit to the respondent's account could still be sufficient proof. That was not done too and the appellant plainly

admitted not to have it at page 619 of the record of appeal. The learned trial judge, as demonstrated above, therefore, evaluated the entire defence evidence and arrived at the conclusion, rightly in our view, that there was no proof that the appellant cleared his liability. Accordingly, we see no justification to fault him.

There was a contention that the respondent's claim of TZS 727,346,800.46 was admitted by the appellant vide e-mail communication of 27th May, 2014 (exhibit P5). The relevant wording on which the contention rests are:-

> *"Attached documents are TISS documents for the payment of fifty million Tsh (TZS 50,000,000) as part payment for the outstanding balance. We shall clear the balance in the near future".*

Once read in isolation from exhibit P6, one may be tempted to believe that the said response amounted to an admission of the outstanding balance. Doing so, in our strong view, will be erroneous and will amount to engaging the Court onto speculations. That is for very obvious reasons that there was no mention of the outstanding amount and whether the appellant had abandoned his former desire or request to have the bank accounts reconciled. We, therefore, refrain from being

carried away by such a contention. We, consequently, find it baseless and dismiss it.

Connected to the above, we have had ample time to examine the evidence on record in regard to the payments allegedly made to the respondent by the appellant as outlined in items 31 and 32 found at pages 10 to 16 of the appellant's written submission in support of the appeal. He claimed that there are 36 credit deposit transactions amounting to TZS 1,765,978,700.00 done by the appellant which have not yet been assigned or allocated respective invoices or delivery notes. Again, this was a matter of evidence. As is the case for bank transfer requests, nothing was produced to prove that. In all, therefore, it is apparent that the appellant did not clear his liability with the respondent for the supplied fertilizer worth TZS 281,975,000.00. As a matter of law, the appellant's failure to pay the outstanding debt amounted to failure to perform his part of the contract hence a breach of contract in terms of sections 37 and 73 of the Law of Contract Act, Cap. 433 R. E. 2019 (the LCA) [see **Mexon's Investment Limited v DTRC Trading Company Limited**, Civil Appeal No. 91 of 2018(unreported)]. Accordingly, ground three (3) of appeal succeeds.

Before we conclude, we wish to address one more issue. In his witness statement, the appellant disassociated herself from some of the LPOs alleging that they never authorised them and the drivers whom they were delivered and or the fertilizer did not reach at her warehouses. The disowned invoices and LPOs were twenty in number. We had ample time to seriously examine them and we realised that only seven of them were tendered in court as part of exhibit P3 and which, as shown above, constituted part of the unpaid invoices in exhibit P2. The respective LPOs were Nos. 00740, 00736, 00742, 00745, 00742, 01485 and 01476. Like the rest of the LPOs in exhibit P3, they bore the appellant's official stamp the authenticity of which was not challenged by the appellant. Their reliability could not therefore be displaced by the mere assertions by the appellant. In that accord we hold that the said LPOs originated from the appellant's office. In all, therefore, it is our finding that there is no proof that the appellant cleared his liability.

All said and for the foregoing reasons, by failure to clear the debt amounting to TZS 281,975,000.00 for the ordered and supplied fertilizers, the appellant breached the contract.

For the foregoing reasons, the appeal, therefore partly succeeds to the above shown extent. For avoidance of doubt, the appellant has to

pay the respondent TZS 281,975,000.00 only which shall carry interest as was ordered by the High Court as the same was not challenged save that interest on the decretal amount at 16% shall be from the date of instituting the suit to the date of judgment instead of the date of instituting the suit to the date of full payment as was ordered by the learned trial judge. Given the outcome of the appeal, we order each party to bear its own costs.

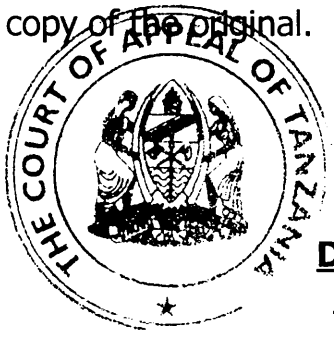
DATED at **DAR ES SALAAM** this 11th day of July, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 13th day of July, 2022 in the presence of Mr. Dickson Mtogosewa, learned counsel for the Appellant and Mr. Ally Hamza, learned counsel for the Respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL