IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MASSATI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CIVIL APPEAL NO. 45 OF 2007

CHARLES THYS ..... APPELLANT

VERSUS

HERMANUS P. STEYN ..... RESPONDENT

(Appeal from the Judgment and Order of the High Court of Tanzania at Arusha)

(Sheikh, J.)

Dated 13th day of October, 2005

in

Civil Case No. 14 of 1999

JUDGMENT OF THE COURT

15th February, & 1ST March, 2016

JUMA, J.A.:

Hermanus P. Steyn, who is now the respondent in this Civil Appeal No. 45 of 2007 before us, went to the High Court at Arusha where he filed a suit against Charles Thys, who is now the appellant. In his plaint, the respondent gave detailed background to why he had gone to the High Court to seek general and specific damages. He described himself as an engineer by training. He had been living in Tanzania from as way back as 1968 at Makuyuni in Monduli district of Arusha region of Tanzania where he had

389,000 acres of farmland operating and registered under the name- "Rift Valley Seed Ltd". His farm produced seeds, vegetables and other produce for export.

A successful farmer he was, the respondent had a total of 265 tractors, several trucks and a workforce of around 12,000 employees. He also had a total of 7 aircrafts two of which he used to spray insecticides across his expansive farm. Apart from his economic activities in Tanzania, the respondent explored and opened similar activities in the neighbouring Burundi where between 1980 and 1981, he established agricultural projects. Commuting between Tanzania and Burundi was made easy because he piloted his own private aircraft between the two countries.

The respondent recalled one particular day of his life on 19/10/1981 when he received a phone call from the police asking him to report at the police station. When he arrived at the police station, a senior police officer arrested and took him to the Arusha Regional Prison where he was detained for three weeks. Thereafter, he was transported to Keko Prison in Dar es Salaam for detention. He was not informed why he was arrested and later detained. Later, he learnt that his arrest and detention was caused by the illegal activities of the appellant whilst travelling in his aircraft to Burundi. All

his properties he had in Arusha, including personal effects, were nationalised by the Government of Tanzania under the provisions of the Specified Companies (Acquisition and Transfer of Management) Act, 1983 [Act No. 20 of 1983].

In his suit, the respondent directed all the blames on the dishonest and fraudulent misrepresentation of facts by the appellant which led to his detention, loss of his properties which were nationalized, and his subsequent declaration to be a prohibited immigrant in Tanzania. Elaborating the nature of the misrepresentation, the respondent recalled that on several occasions he carried the appellant with him in his aircraft from Kilimanjaro International Airport to Bujumbura in Burundi as a non-paying passenger. But, unbeknown to the respondent, the appellant used to smuggle gold, diamonds and Tanzanian currency to Burundi. The Tanzanian authorities came to learn about the smuggling hence the respondent's arrest, detention and confiscation of his properties. He blamed all his troubles on the appellant, his erstwhile passenger.

For the loss he had suffered, he prayed for both the specific damages of USD 150,000,000 and general damages to be assessed by the trial High Court.

The appellant did not testify but swore an affidavit in his defence against the suit. He claimed that he only travelled in Mr. Steyn's air craft once to Bujumbura, and during this flight he only carried on board a small bag. He stoutly denied ever carrying prohibited goods into or out of Burundi. He insisted that copies of customs documents which Mr. Steyn tendered in court were anything but forgeries.

Sheikh, J., the trial judge, found the appellant liable for the false statement/fraudulent misrepresentation to the respondent that he was not carrying any unauthorized goods in the respondent's aircraft. The trial judge awarded the respondent a sum of USD 150,000,000.00 specific damages and USD 1,000,000.00 general damages. Being aggrieved, the appellant lodged the instant appeal in this Court challenging the judgment of the trial court on the following grounds:

> *a)- Her Ladyship the trial Judge erred in law by admitting and relying upon hearsay evidence contained in the Affidavit of Mr. Joseph Nzeyimana.*
>
> *b)- Her Ladyship the trial Judge erred in law by according undue weight to the evidence adduced in the Affidavit of Joseph Nzeyimana.*

c)- Her Ladyship the trial Judge erred in law in finding that the Defendant had unlawfully carried gold from Tanzania to Burundi.

d)- Her Ladyship the trial Judge erred in law in finding that the Defendant's alleged act of unlawfully carrying gold from Tanzania to Burundi caused the confiscation of the Plaintiff's company Rift Valley Seed Ltd under the Specified Companies (Acquisition and Transfer of Management) Act 1983.

e)- Her Ladyship the trial Judge erred in law in finding that the Plaintiff suffered specific damages amounting to USD 150,000,000 after a finding by the Judge that the Plaintiff had failed to provide documentary evidence of the value of the loss.

f)- Her Ladyship the trial Judge erred in law in finding that the Plaintiff suffered general damages amounting to USD 1,000,000 for the tort of deceit.

Before the hearing date, counsel for the respondent, filed three sets of preliminary objection dated 4/12/2014, 26/11/2015 and 9/2/2016 contesting the jurisdiction of this Court to hear this appeal and urging the Court to strike out the appeal. The three points of preliminary objection state:

(1)- That the record of appeal is incompetent in that it does not comply with Rule 12 (4) of the Court of Appeal Rules, 2009.

(2)-That the purported appeal is incompetent for want of a Notice of Appeal.

(3)-That on account of the fact that, a similar appeal (found on the same Judgment and Decree) to *wit* Court of Appeal, Civil Appeal number 92 of 2007 was dismissed on the 8th day of December, 2015 then the current appeal is untenable and or barred by the doctrine of *re-judicata*.

At the date of hearing on 15th February, 2016, the appellant was represented by a learned counsel, Ms. Fatma Karume while the respondent was represented by two learned counsel, Mr. Eric Sikujua Ng'maryo and Mr. Elvaison Erasmo Maro. We took both the preliminary objection and the substantive appeal together and directed the learned counsel to first address us on the points of objection, and later on the grounds of the appeal.

With regard to the ground of objection that the record of the instant appeal has not marked out every tenth line of each page as required by sub-rule (4) of Rule 12, Mr. Ng'maryo referred us back to the Civil Application No. 105 of 2007 wherein the appellant had applied and was on 17/7/2007

allowed by Lubuva, J.A. to amend the record of this appeal in order to comply with requirements of Rule 12 (4) of the Rules. For failing to amend the record accordingly, he submitted, this appeal should be struck out because the appellant must be taken to have deliberately declined to comply with the Order of the Court granting him leave to amend the record of appeal. He urged us to strike out this appeal on this ground.

On the contention that the record of appeal should be struck out for failing to comply with Rule 12 (4), it was contended by Ms. Karume that the Order issued by Lubuva, J.A. was permissive and far from being compulsive on the appellant to justify the prayer of striking out of the appeal. The learned counsel referred us to Rule 2 of the Rules, which exhort the Court to always aim at substantive justice while administering the Rules. As long as the record is legible and well paragraphed, she insisted; the Court should not strike out an appeal simply because every tenth line of each page of the record of appeal was not marked out.

Mr. Ng'maryo next elaborated why he thought that this appeal is incompetent for want of a Notice of Appeal and should be struck out. The learned counsel insisted that one Notice of Appeal cannot simultaneously support two appeals because any notice of appeal is specific and tied to the

memorandum and record of appeal in a single appeal before the Court. He argued that since the Civil Appeal No. 92 of 2007 was dismissed by the Court, the Notice of Appeal that was the basis of that appeal's memorandum and record of appeal should be taken to have been similarly dismissed and cannot now support this Civil Appeal No. 45 of 2007. To support this legal proposition, he referred us our decision in **Laurian J. R. Rwebembera v. Nendiwe Investment Limited**, Civil Application No. 62"B" OF 2008 (unreported), where the Court restated the principle how the striking out of an appeal as incompetent implies also the striking out of that appeal's notice of appeal. Without a fresh Notice of Appeal, he went on, which the appellant does not have, the Civil Appeal No. 45 of 2007 before us is incompetent for want of that notice.

On the ground of objection contending one notice of appeal cannot be used more than one appeal in this Court, Ms. Karume agreed with Mr. Ng'maryo that the correct position of the law is that one Notice of Appeal cannot be the basis of more than one appeal to this Court. But that was as far the learned counsel could agree with Mr. Ng'maryo. She pointed out that as long as the instant appeal was filed earlier than the dismissed Civil Appeal

No. 92 of 2007, the question of a notice of appeal being used more than in once appeal does not arise.

On the third ground of objection contending that with the dismissal of the Civil Appeal No. 92 of 2007, this appeal before us is *res judicata*, Mr. Ng'maryo reiterated that the Civil Appeal No. 92 of 2007 which was dismissed on 8th December, 2015 by a Bench of Kileo, J.A, Mmilla, J.A., and Juma, J.A. is the same in terms of subject matter involving same parties and in *pari materia* with Civil Appeal No. 45 of 2007 presently before this Court. He argued that the dismissal effectively and conclusively makes the instant appeal *res judicata*. He pointed out that the Decree subject of the dismissed Civil Appeal No. 92 of 2007 is the same as the one subject of the instant appeal. On this ground of objection, he urged the Court to strike out the instant appeal with costs.

In her reply, Ms. Karume explained her thoughts why the Civil Appeal No. 92 of 2007 was filed out of time and hence incompetently from the date of its filing. An incompetent appeal, she added, cannot be *res judicata* even if that principle was applicable. Elaborating on the incompetence of the dismissed Civil Appeal No. 92 of 2007, Ms. Karume urged us to look at the Certificate of Delay of that appeal which expected the memorandum and the

record of appeal to have been filed by 2/6/2007, but it was belatedly lodged more than three months later on 26/9/2007. In so far as the learned counsel is concerned, when the appellant sought to withdraw the Civil Appeal No. 92 of 2007, the appellant was in reality withdrawing an incompetent appeal.

Ms. Karume next referred us to several authorities which support her position that the dismissal of the Civil Appeal No. 92 of 2007 does not in any way affect the competence of the current appeal albeit on the ground of *res judicata* even if both appeals had relied on the same Notice of Appeal. She pointed out that if the date of lodging of the two appeals is to go by, the instant appeal (i.e. Civil Appeal No. 45 of 2007) came first before the appellant inadvertently filed a defective Civil Appeal No. 92 of 2007.

The learned counsel went on to give several reasons why she thought that the principle of *res judicata* is inapplicable to bar the instant appeal. **Firstly,** as long as the Civil Appeal No. 92 of 2007 was lodged subsequent to the Civil Appeal No. 45 of 2007, the dismissal of the former appeal cannot bar an appeal that was filed earlier. That is, dismissal does not always invite the application of the doctrine of *res judicata*. At any rate, she added, the Court of Appeal Rules do not bar subsequent appeals when similar appeals earlier filed are withdrawn. **Secondly**, Ms. Karume referred us to paragraph

number 978 of the **HALSBURY'S LAWS OF ENGLAND, FOURTH EDITION (REISSUE) Vol. 16 (2), 2003** to stake her position that the doctrine of *res judicata* as an aspect of Estoppel, is only applicable where the cause of action has been determined on merit. She contended that as long as the Civil Appeal No. 92 of 2007 was not determined on its merits, the doctrine cannot apply to bar the subsisting Civil Appeal No. 45 of 2007. The relevant paragraph 978 states:

> *"**978. Doctrine applicable wherever same cause of action determined on the merits.***
>
> *In all cases where the cause of action is really the same and has been determined on the merits, and not on some ground (such as the non-expiration of the term of credit) which has ceased to operate when the second action or claim is brought, the plea of res judicata should succeed. The doctrine applies to all matters which existed at the time of the giving of the judgment and which the party had an opportunity of bringing before the court. If, however, there is matter subsequent which could not be brought before the court at the time, the party is not estopped from raising it. ...*

Ms. Karume similarly urged us to emulate the statement of law from the former Eastern Africa Court of Appeal in **Ngoni-Matengo Cooperative Marketing Union Ltd v. Alimahomed Osman** [1959] E.A. 577 at page 580 where that court warned about the dangers of construing the phrases "strike out an appeal" and "dismiss an appeal" without looking at the substance of the decision concerned:

> *"...What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used;...."*

In his rejoinder Mr. Ng'maryo urged us to find that as long as the Civil Appeal No. 92 of 2007 was dismissed first, we should not for the purposes of *res judicata*, give credence to the fact that the Civil Appeal No. 45 of 2007

was lodged earlier. In so far as Mr. Ng'maryo is concerned; the dismissal of the Civil Appeal No. 92 of 2007 took away with it the notice of appeal.

From submissions of the two learned counsel, we propose to deal first with the second and third grounds of objection contending that this appeal is bereft of a notice of appeal and that dismissal of Civil Appeal No. 92 of 2007 make the instant appeal *res judicata* as they raise a common question of law and can conveniently be disposed of together. Both learned counsel are on common ground that a single Notice of Appeal cannot simultaneously support two appeals to this Court.

In so far as the effect the dismissal of the Civil Appeal No. 92 of 2007 had on the instant appeal is concerned, we whole-heartedly agree with the position taken in **Ngoni-Matengo Cooperative Marketing Union Ltd v. Alimahomed Osman** which Ms. Karume cited to us. The record of the Civil Appeal Number 92 of 2007 which was filed later than Civil Appeal No. 45 of 2007 bears out Ms. Karume's line of submission that dismissal of the former appeal was not on merit to invoke the doctrine of *res judicata* against the latter. The Order of the Court shows that it was Ms. Fatma Karume who filed a notice moving the Registrar to withdraw the Civil Appeal Number 92 of 2007. On 6/9/2014 the Registrar duly struck out that appeal under Rule 102

(3) of the Rules. Mr. Ng'maryo and Mr. Maro, learned counsel for the respondent filed a notice to refuse the withdrawal of the Civil Appeal No. 92 of 2007 and its striking out by the Registrar. Following the refusal by the respondents, on 8/12/2015 the Court dismissed that appeal with costs. As correctly submitted by Ms. Karume, the Civil Appeal Number 92 of 2007 was not heard on its merit before its dismissal as to raise the doctrine of *res judicata* as against the instant appeal before us. Insofar as we are concerned, the second and the third grounds are devoid of merit and are hereby dismissed.

With regard to the remaining point of objection contending that this appeal has not complied with Rule 12 (4), we shall dismiss this ground just as this Court has done previously when similar objections were raised. In **ARCOPAR (O.M.) S.A vs. Herbert Marwa & Family Investments Co. Ltd and Three Others,** Civil Application No. 94 of 2013 (unreported), the Court had the occasion to deal and dispose of an objection that the record of appeal was defective because every tenth line of each page was not indicated in the margin on the right side of the sheet as required under Rule 12 (4). The Court stated:

"...Fortunately in the present case, the Court has already previously commented on the provision now in question. The first occasion was in ***The Presidential Parastatal Sector Reform Commission vs. The Impala Hotel Limited,*** *Civil Appeal No. 100 of 2003 and the second one was in* ***Global Dlstributors (T) Ltd And Two Others vs. CRDB Bank Ltd*** *Civil Appeal No, 87 of 2001 (both unreported) where a similar objection was raised. The Court held that:-*

> *'The Court will undoubtedly be inconvenienced in reading pages of the record of appeal whose tenth lines are not indicated, but this is not a ground for rendering the appeal being incompetent'.*

We do not see any circumstances that would move us to depart from those decisions. Consequently, we find that this objection is also devoid of merit and we dismiss it..."

In the result, all the three points of preliminary objection are hereby dismissed.

After disposing of the preliminary objections raised by the respondents, Ms. Karume began to submit on the ground of appeal that faults the trial judge for making a finding that it was the appellant's unlawful freighting of gold to Burundi that caused the confiscation of the respondent's Rift Valley Seed Company Ltd under the **Specified Companies (Acquisition and Transfer of Management) Act 1983** (the Act). The learned counsel contended that what happened to the respondent's property was not confiscation as the respondent and the trial High Court claimed. It was acquisition by the Government through an Act of Parliament. She invited us to revisit section 3 (1) and 11 (1) of the Act to see for ourselves how the compulsory acquisition was an act of the Government and the statutory undertaking to pay the respondent his due compensation. The relevant provisions state:

> ***3 (1)****-As from the effective date all shares in each of the specified company shall by virtue of this section and without further assurance, vest free of a trust, mortgage, charge, lien, interest or any other encumbrance of any kind, shall be deemed to have vested as from the effectlve date and the Treasury Registrar shall be the sole shareholder of each of the specified company.*
>
> ***11 (1)****- Subject to the provisions of this section, the United Republic shall after consultation with the previous owner, pay*

such compensation in respect of the shares in each of the specified companies acquired under section 3 (1) as the Minister for Finance may determine as being full and fair compensation.

Ms. Karume wondered why, the trial judge could on page 132 observe that the respondent had in fact commenced negotiations with the Government over compensation; yet fail to direct the respondent to pursue that compensation from the Government instead of making the appellant his scapegoat. The learned counsel faulted the trial judge for failing to make adverse comments on the respondent's failure to bring witnesses from the Government of Tanzania to testify on the reason behind the respondent's arrest and acquisition of his property under an Act of Parliament.

Ms. Karume poured scorn on the affidavit evidence of Mr. Nzeyimana, describing that evidence as far-fetched with no link to the appellant. According to the learned counsel, the trial judge should not have lent credence to the affidavit evidence to the effect that the appellant had illegally carried gold whilst on board the respondent's aircraft. Ms. Karume urged us to re-evaluate the evidence and make a finding that there is no evidence to prove that the appellant had at any time when travelling in the

respondent's aircraft, illegally airfreighted gold to Burundi. Ms. Karume faulted the trial judge over differential treatment of evidence by evaluating the evidence for the respondent/plaintiff and ignoring that for the appellant/defendant.

Finally, the learned counsel faulted the trial judge for awarding special damages amounting to USD 150,000,000 to the respondent without proof. She urged us to allow this appeal.

In his replying submissions, Mr. Ng'maryo insisted that in civil suits disputing parties present to the trial courts their respective pleadings and evidence, and leave then to the trial courts to decide on the scale of balance of probabilities. According to the learned counsel, this is what the trial judge did on page 152 of the record of appeal when she stated the following:

> *"....Upon careful consideration of the evidence adduced by the respective parties I have come to the conclusion on the preponderance of probability that the false statement/fraudulent misrepresentation was made, that is the defendant did orally represent to the plaintiff that he was carrying only his personal effects and that he was not carrying any unauthorized goods or contraband, to induce the plaintiff to give him a lift, and that the plaintiff relying on this statement*

gave the defendant a lift at least once in his aircraft. I also on the preponderance of probability do find that on the facts the defendant was clearly guilty of fraudulent misrepresentation because he knew it was not true..."

Mr. Ng'maryo found no differential treatment of evidence submitted on by Ms. Karume. He pointed out that apart from the affidavit evidence of Mr. Nzeyimana, the respondent himself came forward to testify, and was believed by the trial judge. The appellant on the other hand, did not testify but only relied on very brief affidavit evidence. This, on balance of probabilities, tipped the scale of justice in the respondent's favour.

Next, Mr. Ng'maryo defended the general and specific damages which the trial judge awarded since there were specific paragraphs of the plaint praying for these two heads of damages. On general damages, he pointed out, the respondent proved substantial mental and emotional stress he suffered when he was arrested and his properties taken over by the Government. Reacting to the suggestion that the respondent did not produce documents to support his claim for specific damages of USD 150,000,000.00, Mr. Ng'maryo referred us to the Schedule of the Specified Companies

(Acquisition and Transfer of Management) Act, 1983 which lists properties which the Government took from the respondent as proof for specific damages. According to the learned counsel, the respondent was successful farmer, engineer with private aircraft. The effect of the Act was to wipe out everything which the respondent had. Mr. Ng'maryo further elaborated the sufferings of the respondent by recalling the evidence that the respondent was released from detention on 17/8/1982 and he and his wife were immediately declared prohibited immigrants. This prohibition was only lifted on 6/6/1994.

Having considered the rival submissions on the grounds of appeal, we shall be guided by the principle that sitting as it is on first appeal from the decision of the trial High Court, the Court is entitled to re-appraise the whole evidence, form its own impression of it and come to its own findings and conclusion: see for example- **Jamal A. Tamim vs. Felix Francis Mkosamali and Another**, Civil Appeal No. 110 of 2012 and **Juma Kilimo vs. R.** Criminal Appeal No. 70 of 2012 (both unreported).

There are two important links in the chain of causation that shall guide our re-evaluation of evidence that was presented before the trial High Court. The first evidential link in the chain is whether from the evidence, the trial

judge was right to conclude that on several occasions when the appellant travelled in the respondent's aircraft between 1980 and 1981, he falsely represented to the latter that he was only carrying his personal effects but in fact declared some goods to the Burundi Customs Authorities which the respondent was not aware of?

The second important evidential link in the chain is the relationship between the cause (the appellant bringing contraband goods on board an aircraft destined for Burundi) and the consequence (the arrest, detention of the respondent and his loss of properties). That is whether if indeed the appellant had breached the laws of Tanzania by exporting custom-controlled goods on board the respondent's aircraft, it was the proximate cause for the arrest, detention of the respondent and his subsequent loss of his properties.

Both the first and second links in the evidential chain must be proved on the balance of probabilities.

In so far as the first link of the evidential chain is concerned, the trial judge believed the respondent's evidence that he (the respondent) had initially thought that his predicament was a mere Presidential detention. But later, Mr. Nzeyimana, the Burundian Minister wrote to inform the respondent

that it was in fact the appellant who had after all caused all his troubles because he used to smuggle on board the respondent's aircraft some gold, diamonds, currency, etc. which he declared in Burundi but not in Tanzania. In other words, the trial judge believed the version of evidence proving that it was Mr. Nzeyimana who alerted the respondent about the fraudulent representation consequence of which was the arrest of the respondent, his detention, the loss of property and suffering of damages.

On our part we do not think that the learned trial judge evaluated all the evidence that was before the trial court to justify her conclusion that it was the appellant who made the alleged false statement/fraudulent misrepresentation to the effect that he, the appellant was carrying only his personal effects whilst he was not. The trial High Court had the obligation to evaluate all the evidence that was brought for the plaintiff/respondent and for defendant/appellant objectively. This obligation did not come out when the trial judge reached the following conclusion:

> *"... I am satisfied by the plaintiff's oral evidence and on this basis I find that* ***the defendant having falsely represented to the plaintiff that he was only carrying his personal effects*** *on the several trips he made in the plaintiff's aircraft in 1980-1981, had also unknown to the plaintiff carried goods*

which were then unauthorized in Tanzania, and then unknown to the plaintiff made declaration thereof to the Burundi Customs Authorities and concealed this fact from the plaintiff." [Emphasis added].

The trial judge did not evaluate the evidence on record which shows that before the appellant boarded into the respondent's aircraft the respondent himself made sure that he first passed through the customs where the appellant had to comply with a statutory duty to ensure that he did not take from the United Republic any contraband goods in violation of the applicable customs laws. The trial judge should have evaluated how, despite the efforts of the pilot/plaintiff, the appellant could still manage to smuggle through customs some contraband goods to Bujumbura.

There is similarly an apparent misapprehension of evidence for the trial Judge to condition the appellant's travels as a passenger in the respondent's aircraft to carrying only his personal effects on board but not any unauthorized goods or contraband. We do not think it was this promise which invariably induced the respondent to allow the appellant to travel in his aircraft to Bujumbura. From the respondent's own evidence on page 42 of

the record, it is shown that after getting to know the appellant for the first time whilst in Burundi, it was the respondent who expressed his wish to start the flower and vegetable growing business in Burundi. Being well-connected in Burundi, it was the appellant who offered to introduce him to the Burundian Government officials.

With regard to the second link in the evidential chain, the trial judge relied on the affidavit evidence of Mr. Nzeyimana to link the appellant's alleged violation of customs laws of Tanzania whilst in the respondent's plane, and the subsequent arrest and detention of the respondent. There are certain aspects of Mr. Nzeyimana's affidavit evidence that bordered on hearsay which the trial judge did not evaluate to test the veracity of the link between the alleged air freighting of contraband goods to Burundi and the subsequent arrest, detention of the respondent. For example, Mr. Nzeyimana stated that he was once a Minister in Burundi responsible for Labour and Social Welfare and in that capacity he processed the appellant's residence and work permits making him familiar with the business the appellant was conducting in Burundi. It is not clear from the evidence whether his position as a Minister for Labour always placed him at Bujumbura airport in time to witness the appellant passing through customs with items to declare.

Again, the trial judge did not evaluate the tenuous affidavit evidence of Mr. Nzeyimana who averred how he was approached by three unnamed Tanzanian security officers with copies of Burundi Customs Declaration Forms which showed how the appellant had declared the importation into Burundi of Tanzanian Currency notes as well as gold, and Mr. Nzeyimana somehow retained copies of these forms for the respondent to annex to his plaint.

Similarly, the learned trial Judge did not evaluate the affidavit evidence of the appellant Charles Thys, specifically when he stoutly denied the contents of the affidavit evidence of Mr. Nzeyimana that the appellant had smuggled Tanzanian Currency notes as well as gold out of Tanzania to Burundi. The appellant also averred in his affidavit that the allegations made against him that he smuggled gold and currencies are false.

On several occasions this Court has reiterated the duty placed on courts to evaluate and weigh the evidence for both sides of the dispute. In **Damson Ndaweka vs. Ally Saidi Mtera**, Civil Appeal No. 5 of 1999 (unreported) the Court, sitting on second appeal from the original decision of the trial Court of Resident Magistrate, found that while the trial magistrate analysed and considered the evidence for both the appellant (the original

plaintiff) and the respondent (defendant) before coming to the view that the respondent's case was more credible than that of the plaintiff; the first appellate High Court did not do likewise. The Court observed:

> *"...On the other hand, as regards the first appellate High Court, the extract above reveals a different picture. From it we are respectively in agreement with Mr. D'Souza, that the learned judge on first appeal scantly addressed, analysed and weighed the evidence for both sides and tested the finding of the trial court against such evidence. As a matter of fact, the learned judge hardly analysed the evidence of Michael Kifai Msaki (PW4), a village headman.... The High Court, as the first appellate court was bound to analyse the evidence for both sides with a view to satisfy itself that the finding of the trial court was justified on the evidence. As happened in this case, we think as correctly submitted by Mr. D'Sauza, it was an error on the part of the learned judge on first appeal in not considering and weighing the evidence for both sides."*

By failing to evaluate all the evidence adduced the trial court cannot be taken to have on a balance of probabilities reached a balanced decision. In addition, we did not find sufficient evidence on the record to prove on balance of probabilities that the appellant's travelling on board the

respondent's aircraft had any proximate link to the respondent's arrest, detention and subsequent acquisition of his properties by the Government of Tanzania.

In the end result, the judgment of the trial High Court cannot stand. We shall accordingly allow this appeal with costs, and set aside the judgment of the trial court.

DATED at **DAR ES SALAAM** this 29th day of February, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

S.E MUGASHA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL