

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

(APPELLATE JURISDICTION)

PC. CIVIL APPEAL NO. 12 OF 2017

(Arising from Civil Appeal No. 26 of 2016 of Kishapu District Court (R.A. Oguda, RM);
Original Civil Case No. 12 of 2016 of Mwamashele Primary Court)

TINDE GUSANI.....APPELLANT

VERSUS

EMMANUEL A. MAKENZI.....RESPONDENT

Date of Last Order: 18.10.2018
Date of Judgment: 21.12.2018

JUDGMENT

V.L. MAKANI, J

This appeal is against the decision of Kishapu District Court in Civil Appeal No. 26 of 2016 (R.A. Oguda, RM) and the case originated from Mwamashele Primary Court in Civil Case No. 12 of 2016.

Before the appeal could take off the appellant passed away. His brother one **MOHAMED DASE** was appointed the administrator of the estate of the appellant and he took over the conduct of the appeal. The Form IV was filed in court as part of the record.

At the primary trial court, the matter proceeded ex-parte as the late Tinde Gusani though duly served refused to enter appearance. The trial magistrate was satisfied with the evidence by the respondent that the appellant's livestock entered his farm and destroyed his

crops; and he awarded TZS 5,009,000/= as compensation for the damage caused by the appellant's livestock as assessed by the Agricultural Officer of Lagana Ward whose assessment was tendered in court as Exhibit PEX1

The District Court upheld the decision of the trial court but reduced the amount payable to TZS 1,500,000/= stating that the amount was huge compared to the addressed items in the assessment list.

The appellant was dissatisfied with the decision of the District Court hence this appeal with four grounds of appeal. The grounds are as follows:

- 1. That the appellate magistrate erred in law and facts to uphold the decision of the trial court which was entered while the trial court had no jurisdiction as the matter and the element of tort.*
- 2. That the appellate magistrate erred in law and fact that, to uphold the decision of the trial court which was entered injustice as the appellate was not given a chance of being heard as he was sick and admitted in court when the summons was duly served.*
- 3. That the appellate magistrate erred in law and facts to uphold the decision of the trial court which was injustice by evaluating evidence of exporter with no jurisdiction.*
- 4. That the appellate magistrate erred in law and facts to enter judgment of upholding the decision of the trial court which was confusion.*

At the hearing of the appeal, Mr. Dasi adopted the grounds of appeal. He said the Agricultural Officer was not called as a witness and the

report by him was a photocopy. He said since the report was in photocopy it creates a lot of doubt. He said they were not ready to pay the respondent TZS 1,500,000/= as was ordered by the District Court. He prayed the appeal to be allowed.

In response the respondent said the report of the Agricultural Officer was genuine and it was stamped and the trial court was satisfied by it hence gave its orders. He prayed for the reply to petition of appeal to be adopted and the appeal be dismissed.

Mr. Dasi did not have anything useful to add save he reiterated his prayers for the appeal to be dismissed.

I have gone through the record of the trial and District courts and the respective judgments. The grounds of appeal as can be observed herein above are a mix up and confusion. However, the main thing that can be observed from the oral submissions is that the appellant does not wish to pay the decree amount stating that he was not given an opportunity to be heard and that the report/assessment by the Agricultural Officer cannot be relied upon as the Officer was not called as a witness and further that the report/assessment was a copy not original.

I would wish to state that the claim by the appellant that he was sick and could not appear in court is not genuine. The respondent made efforts to serve the late Tinde Gusani with summons to appear in court through the Ward Executive Officer of Lagana but the efforts


were futile as the late Tinde Gusani refused the summons and said he would not go to court unless the police were involved. So the argument that he was sick cannot hold water. He deliberately decided not to appear in court and therefore the trial court properly proceeded with the case in the absence of the late Tinde Gusani. If at all the he was sick as alleged he would have presented proof to the court or sent a person to inform the court of his sickness.

The appellant claimed that the exhibit (report/assessment by the Agricultral Officer) that the trial court relied upon was a photocopy and the person who prepared the document was not called as a witness in court. I agree with the appellant that a photocopy is only admitted in evidence as an exhibit where there are sufficient reasons advanced as per section 62 of the Evidence Act CAP 6 RE 2002. The exhibit on record is a copy and the proceedings are silent as to whether the exhibit that was tendered and admitted was a photocopy or an original. And since there is a copy on record, then the assumption is the said copy was admitted as an exhibit. The proceedings are silent as to why the trial magistrate admitted a copy. The procedure to admit the said report/assessment was not proper and to make matters worse the maker of the document was not called as a witness so that he could be cross-examined on the contents therein. The fact that the document had a stamp does not change it from photocopy to original. In view thereof the report/assessment by the Agricultural Officer (Exhibit PEX1) cannot be relied upon and it is hereby expunged from the record.

Irrespective that Exhibit PEX1 has been expunged from the record, but there is still evidence by the respondent and SM2 Masanja Makalwe that the livestock of the late Tinde Gusani entered and damaged the crops and farm of the respondent. And further that the late Tinde Gusani used to forcefully graze his livestock in the respondent's farm. The evidence by the respondent and SM2 were not controverted and thus there is proof that indeed the livestock of Tinde Gusani entered and damaged the respondent crops and therefore the respondent must have suffered a kind of loss which have to be compensated by general assessment. In that respect, I invoke the revision powers and reduce the compensation amount to TZS 500,000/= to be paid to the respondent for the damage and loss occasioned by the livestock of the late Tinde Gusani.

For the reasons above, the appeal is partially allowed. The decision of the District Court is quashed and set aside and the administrator of the estate of the appellant is ordered to pay TZS 500,000/= to the respondent. There shall be no order as to costs.

It is so ordered.



V.L. Makani
V.L. MAKANI
JUDGE
21/12/2018