

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 4 OF 2018

JOSEPH MWASAMANYETA.....APPELLANT

VERSUS

ASHIBE TANZANIA LIMITED.....RESPONDENT

*(Arising from Civil Case No. 72 of 2015 Resident Magistrate's
Court of Dar es Salaam at Kisutu)*

JUDGMENT

Date of Last Order: 23/03/2020

Date of Judgment: 22/07/2020

S.M. KULITA, J.

The appellant **JOSEPH GWAKABALE MWASAMANYETA** dissatisfied with the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu lodged his appeal with basing on the following six grounds of appeal as listed hereunder;

1. That the trial Magistrate erred in law and in fact by ignoring the substantive part of evidence and taking into considerations irrelevant factors which were not at issue.
2. That the trial Magistrate misdirected himself by holding that the time of tempering with the electricity meter number 2421087911 was not indicated by the defendant's witnesses contrary to the evidence on record.
3. That the trial Magistrate erred in fact by accepting the evidence of the plaintiff of purchase of electricity token for meter number 24210587911, while at the same time rejecting the defendant's ownership of the same LUKU meter number 24210587911 and TANESCO demand on the same LUKU meter number 24210587911.
4. That the trial Magistrate erred in law and fact by awarding the plaintiff specific damages of Tanzanian shillings 3,500,000/=
5. That the trial Magistrate erred in law and fact by holding that the defendant's sale of the plaintiff's generator to pay the outstanding TANESCO bill was illegal and in awarding the plaintiff the general damages of Tanzanian shillings 10,000,000/=

amounting Tsh. 4,236,021/= after selling the respondent's generator but there is no evidential proof that such payments were actually affected. Generally, I find this ground of appeal has no legal weight.

Turning to ground no. 2 of the appeal in which the appellant's counsel submitted that the trial Magistrate misdirected himself by holding that the time of tempering with the electricity meter number 2421087911 was not indicated by the defendant's witnesses, the findings which is contrary to the evidence on record. This ground is also baseless as the trial Magistrate clearly reached into that conclusion regarding the evidence on record on the 25th day of December, 2014 is Technician for TANESCO one Juma Iddi (DW2) found the said meter tempered. His report was then verified by the Engineer, Cosmas Mhende (DW3). The issue here is **when was the said meter tempered?**. The fact that there is no evidence as to when the said meter was tempered could be wrong for the trial Magistrate to declare that the Respondent is responsible just for the reason that by the time the alleged fault/temper was recovered on the 25/12/2014 she was a tenant in the said house. According to the records tenancy for the Respondent over the said house started on 15/1/2013 which means that the said temper might have been done even before the

said meter is the one which triggered the dispute between the plaintiff and the defendant the trial court could not avoid discussing the issue of that said meter in the analysis of evidence narrated by the parties during trial. Therefore, the trial court was right in basing its analysis on evidence in respect of the said meter number. It should be noted that the court's hands are not tied to the framed issues only in the analyzing the evidence towards arrival of the just decision. The appellant has also not established in his submission as to how he was prejudiced by the trial court's analysis of evidence in respect of electricity meter number 2421087911. As for the issue of the holder for the said meter, though the trial court had different view that it might be holden by somebody else, but I can agree with the respondent's counsel that what happened is just the typing error of the names of the customer holding the said meter. Even the way the said names are read ie. J. GWAKARE as written by TANESCO in the demand letter to the Appellant, and JOSEPH GWAKABALE MWASAMANYETA the name used in the case at hand seem to be addressing the same person. I find this issue has no merit hence dismissed.

Another thing that I have noted is that though it is not there in the analysis of the trial court's judgment but the records transpire that the appellant alleged to have paid the outstanding electricity bill

2421087911 Mr. Ishengoma submitted that the said ground of appeal lacks legal basis as those were mere facts unless the appellant thinks there are issues which need appellate court's interference.

Arguing on ground four Mr. Ishengoma submitted that the standard of proof in civil cases is on the balance of probabilities, and the respondent tendered the evidence to prove on how the costs to a tune of Tanzanian shillings 3,500,000/= had been incurred.

Replying on the last ground of appeal Mr. Ishengoma submitted that the appellant had no mandate to seize and sell the respondent's multi-purpose generator. He submitted that the appellant had the options to pursue his rights in the court of law.

Mr. Ishengoma concluded his submission by praying for dismissal of this appeal as it lacks merits.

From the above submissions I hereby start my analysis with grounds no. 1 and 3 of the appeal collectively. In these grounds the appellant argued in his submission that the meter number was not among the issues which were framed at the trial court hence the trial Magistrate was wrong to rely on it in his analysis towards the decision. With regard to that I am of the view that since the

respondent's failed to pay the outstanding bill, the appellant had no option but to sell the generator whereby prior to the sale the appellant notified the respondent, so that she could settle the outstanding bill.

Replying to the appellant's submissions the respondent's learned advocate Mr. Ishengoma submitted in respect of ground one that it is the misconception of the appellant's advocate that issues not framed during the final pre-trial conference were not supposed to be analysed by the trial court. Mr. Ishengoma said that the court had to analyse the said issues as they were facts according to the evidence of the appellant during the hearing of the matter at the trial court.

Arguing on ground two of appeal Mr. Ishengoma submitted that the appellant has failed to prove the said claims as the evidence of DW2 and DW3 were contradictory as to when the inspection took place. He said that while DW1 said that it was conducted on 25/12/2014 DW2 stated that he did receive the said inspection report on 14/12/2014. Thus the findings of the trial court were correct.

With regard to ground three of appeal which is concerned with difference in names in respect of the holder of the LUKU Meter No.

done on the 25th December, 2014 showed that it was tempered. He said that it was within the time when the respondent was occupying the house which is from 15th January, 2013 to 15th January 2015. He went on to submit that the said temper resulted TANESCO to issue a demand payment of Tanzanian Shillings 4,236,021.81/= as the outstanding bill.

Arguing on ground three of appeal Mr. Mbugha submitted that the trial court admitted electricity token purchase receipts from the respondent while the names which appeared on the demand letter from TANESCO were read different names because the difference in those names was just a typing error. But in real sense the addressee was the same person, appellant.

Arguing on ground four of appeal Mr. Mbugha submitted that the trial court erred in law and fact by awarding the plaintiff specific damages of Tanzanian shillings 3,500,000 without proof as required by law.

As for the 5th and last ground Mr. Mbugha submitted that the appellant advised the respondent who was in occupation by that time to settle the outstanding bill and he retains the generator as security for settling the said outstanding bill whereby failure to settle the bill would result to offset. Mr. Mbugha said that the

6. That the proceeding and judgment of the trial court are vitiated by various changes of trial magistrates without assigning any reason for so doing.

Wherefore, the appellant prays for the appeal to be allowed, the trial Magistrate court's decision be quashed and set aside.

The appellant is represented by Mr. Ibrahim Mbugha, the learned advocate while the respondent is represented by the learned advocate Respicius Ishegoma. The appeal was argued by way of written submissions where the parties submitted as hereunder;

The appellant's learned advocate Mr. Mbugha decided to abandon ground no. 6 of the appeal.

With regard to ground one of appeal Mr. Mbugha submitted that the issue of whether the meter number 4121087911 was registered in the name of the appellant was not among the framed issues. It was therefore wrong for the trial magistrate to base his decision on the finding that the said meter was not belong to the appellant. He also submitted that the question of whether the appellant paid the outstanding electricity bill to TANESCO was also not among the framed issues.

With respect of ground two of appeal Mr. Mbugha submitted that the evidence on records showed that inspection of the meter was

Respondent had rented the house. Therefore, the 25/12/2014 being the date of inspection on which the alleged temper was noticed it means the act might have been done by somebody else. It was therefore right for the trial court to find the Respondent not responsible.

As for the issue of special damages which is the 4th ground of appeal I find the special Damage of Tsh. 3,500,000/= properly awarded. Unlike the way it was submitted by the appellant's counsel, it was proved by the Respondent by tendering the receipts (Exh. P2) which show that she had paid that said sum for the welding activities to repair the gates and doors at the new premise after vacating the appellant's premise. The source of claim was that their multi-purpose generator could have not been used for that purpose because it was retained by the appellant who had refused to return it to them.

The 5th ground of appeal that the trial court was wrong to order the Appellant to release the multi-purpose generator to the respondent unconditionally or pay her at the current market value. I make that order undisturbed as there was no dispute that the same was lawfully owned by the respondent before it was detained and then sold by the Appellant. The appellant had no right to take

or dispose it without consent of the owner. The decision of the lower court in that respect was right. The appellant was supposed to take legal actions if he felt aggrieved.

In the same ground the appellant challenged the award of the General Damage. Actually the award of that kind of damage is under the discretion of the trial court. The records show that the claim was Tsh. 30,000,000/= but the award was Tsh. 10,000,000/= of which I find reasonable, hence remains undisturbed.

In upshot I find this appeal has no legal weight and the same is hereby dismissed with costs.



HC

S.M. KULITA

JUDGE

22/07/2020