

**IN THE HIGH COURT OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA**

PC. CIVIL APPEAL No. 39 OF 2019

*(Arising from the Civil Appeal No. 01/2019 of Misungwi District Court at
Misungwi originating from Civil Case No. 11/2019 of Misungwi Urban
Primary Court)*

BENARD M. MASHIBA ----- APPELLANT

VERSUS

MKUKUWANI SACCOS ----- RESPONDENT

JUDGMENT

01st June & 27th August 2020

TIGANGA, J

Before Misungwi Primary Court, the Respondent Mkukuwani SACCOS sued the appellant for recovery of Tshs. 19,389,416/=, which is a principal loan of Tshs. 11,029,079/= plus interests of Tshs. 8,360,337/=, which he borrowed from the respondent on the terms that he would return it, but he failed to return the same. According to the evidence, the appellant took three loans, the first loan was of Tshs. 6,320,827/=, the second one Tshs. 3,043,250/= while the third and last was of Tshs. 1,665,000/= all making a total of Tshs. 11,029,079/= (the principal amount) and Tshs. 8,360,337 (the interest) making a grand total of Tshs. 19,389,416/=, and other incidental costs, accrued from 2012, when the appellant officially retired from service.



Before the trial court, the appellant did not dispute to be indebted, but he disputed the amount claimed on the ground that the same was inflated. From the response of the appellant, the court found that he admitted the principal amount. The court adjudged the appellant to pay Tshs. 11,029,079/= which was allegedly admitted and proved by a salary slip from Treasury showing three codes namely 395,395 C and 395 D.

After such finding, the appellant agreed to pay the debt and proposed to pay the same within five months at the monthly installment of Tshs. 2,205,815/=.

After the decision of the trial Primary Court was passed, the appellant appealed before the District court of Misungwi where he raised only one ground of appeal as that;

- i. That Misungwi Primary Court erred in law and facts by procuring a decision and orders basing on contradicted and confusing admissions and compromise of the appellant.

He asked the appellate District Court to allow the appeal and make an order for the matter to be tried *de novo*. After hearing the appeal the appellate District Court found the appeal to have no merit and dismissed it for want of merit.

Once again aggrieved by the decision of the District Court the appellant once again appealed to this court in further search of justice where he raised four grounds of appeal as follows;

- i. That the trial and appellate court erred in law and fact by delivering Judgment in favour of the respondent basing on the allegation that the appellant admitted the debt.
- ii. That the trial and appellate court erred in law and facts by delivering judgment in favour of the respondent without regarding that there was no genuine evidences to prove the debt.
- iii. That the trial and appellate court erred in law and facts by delivering judgment in favour of the respondent without regarding that the suit was time barred.
- iv. That the trial and appellate courts erred in law and facts by delivering Judgment in favour of the respondent without regarding that the suit was not proved under the balance of probabilities.

He prayed the appeal to be allowed with costs, and the decision of the trial and appellate court be set aside.

By the leave of the court the appeal was argued by way of written submissions which were filed as scheduled. The appellant in his submission in chief submitted that, no point in time where the appellant admitted the debt as the trial court decided in the judgment.

He submitted that the statement that *"mheshimiwa ni kweli ninadaiwa ila kiwango kilichosomwa kwenye hati ya madai siyo kweli kwani pesa hizo nilikuwa nisha zilipa"* is ambiguous, and that since the appellant said that he had already paid the debt in such circumstances, the trial magistrate was required to record matters which are admitted and denied by the appellant and later on give the parties right to call witnesses and

produce evidences to support his defence. According to him, surprisingly, the court did not bother to abide with this procedure but also the 1st appellate court relied on the ambiguity admission to decide in favour of the respondent.

He submitted further that, the trial court did not comply with Rule 44 of the Magistrate courts (Civil Procedure in Primary Courts) Rules GN 310 of 1964 as it did not record the response, the admission and what was denied by the parties.

Regarding the second grown of appeal the appellant contends, that the respondent never tendered any contract to prove the amount which was allegedly claimed and for which a judgment based, and a proof that the same has never been paid. He submitted further that it was to the surprise that the trial Magistrate used a common sense to deliver judgment basing on the document which he claimed to have come form the treasury with code No. 395,395 C and 395 D.

The question which remained unresolved is how did the trial magistrate get the said document and when. This question arises as the record is silent, it does not show whether they were tendered in accordance with the procedure. He submitted that, that is a serious violation of legal procedure; he asked that the same be expunged from the record.

On the last ground he submitted, that the matter was filed out of time as it seems that it was filed after the lapse of seven years from 2012 June, up to 13/02/2019. He submitted that the law especially rule 5 (a) of

the Magistrate's courts (Limitation of Proceedings under customary law) Rules GN 311/1964, which provide for the period of limitation in the proceedings for damages for breach of contract or to enforce a contract, to be six years.

He submitted that since the said law applies in Primary Court, then he insist that the matter was filed out of time and therefore it deserves to be dismissed.

He in the end asked for the decision of the 1st appellate court to be quashed. Responding to the 1st ground of appeal the counsel for the respondent submitted that the claim was read to the appellant before the trial court at page 2 of the proceeding where the appellant admitted the fact that he was indebted by the respondent. He only disputed the amount. But when the respondent was called upon by the trial court to respond to what has been pleaded by the appellant in respect of the claim, the respondent elaborated to the court at page 2 of the proceedings, that the second paragraph the amount that was due. Having heard the respondent, the court found that the debt was not disputed, but the amount owed to him and based on the amount that was established by the respondent.

It was after he was given a breakdown at page 2 and 3 of the typed proceedings, and called upon to respond, when the appellant at page 3 admitted the debt and committed himself that he would pay the outstanding balance in five installments commencing on 30th March 2019 which proposition was not objected by the respondent, that is when the trial court entered judgment on the appellants own admission. He thus

prayed that the first ground lack merits, he asked the same to be dismissed.

Regarding the 2nd and 3rd grounds of appeal, he submitted that these grounds were not raised at the first appellate court they cannot be raised this stage of second appeal. He asked the court to be guided by the authority in the case of **Godfrey Wilson Vs The Republic**, Criminal Case No. 168/2018. He further submitted that the 3rd ground has some legal issues; therefore the same was supposed to be raised at the 1st appellate court and not at this stage. He also made reference to the decision in the cast of **Tanzania Pharmaceutical Industries Limited Vs Dr. Ephraim Njau** (1999) TLR 299. He asked the appeal to be dismissed with costs.

In his rejoinder, the counsel for the appellant, while responding to the 1st ground of appeal, he almost reiterated what he submitted in chief in respect of the same ground. With regard to the 2nd ground, he submitted that, it is not a new issue as at page 2, of the proceedings of the appellate District Court, he complained that, the trial magistrate used the documents which were never tendered in the proceedings; he said that was skipped by the 1st appellate court to deal with it.

He submitted that the 3rd ground being the point of law, can be raised at any time and at any stage even on appeal as the question of limitation affect even the jurisdiction of the court as no court can entertain the case without jurisdiction.

He submitted that in **Tanzania pharmaceutical Industries Limited Vs Dr Ephraim Njau** (1999) T.L.R 299 at page 300, the decision

is clear that a legal issue not raised at trial, can be raised at the appellate stage. He cited also **Tanzania China Friendship Textile Co. Ltd Vs Our Lady of the Usambara sisters** (2006) TLR 70 CA.

While in **DPP Vs Marwa Mwita** (1980) TLR 306, he submitted that there is no estoppel against the statute. He insisted that GN. No. 311/1964, Rule 5 (a) prove that the suit of that nature is six years, while this one was filed on the 7th year.

Last he cited the case of **Anwar Z. Mohamed vs Said Selemani Masuka**, Civil Reference No. 18 of 1997 CAT – which held *inter alia* that, the case filed out of time renders the court to have no jurisdiction. He prayed the appeal to be allowed with costs.

That is a comprehensive summary of the proceedings before both the trial and 1st appellate court, as well as the grounds of appeal and the argument in support and against appeal. Now gathering from what I have summarised above, it is not disputed that the decision and finding of the trial Primary Court was predicated on the facts that the appellant admitted the debt; therefore the judgment was interred on admission of the debt. If that is the case, then the court was supposed to be guided by the procedure governing the admission or denial of the claim in the proceedings of civil nature instituted before the Primary Court as provided under rule 44 of the Magistrates Court (Civil Procedure in Primary Court) Rules, GN 310 of 1964 as amended by GN No. 119 of 1983.

As correctly submitted by the counsel for the appellant, the rule provides for the procedure which must be adhered to. For easy reference, I will reproduce it here under;

"At the first hearing of proceedings, the court shall ascertain from each party whether he admits or denies the allegations made against him by the other party and shall record all admissions and denial and shall decide and record what matters are in issue"

The provision is clear, that at the first day when parties appear before the Primary Court, the court has the following duties;

- i. To make known to the defendant the claim lodged by the plaintiff by reading the claim from the claim form and allowing the claimant to explain his/her claim in the presence of defendant,
- ii. To ascertain from each party, starting with the defendant, what among the claim is admitted or denied by him and then to the plaintiff what among those responded to by the Defendant she or he admit,
- iii. To record the admission and denial, here it means, it needs to categorically record what has been admitted by each party after ascertaining herein above,
- iv. To record, what matters are admitted, and what are in issue and let the parties sign on the proceedings particularly on the agreed issues.
- v. Though not expressly provided in the rule, but the practice requires that, after ascertaining, those matters which are admitted, must be

taken to be admitted and must have the judgment on admission entered, but those denied, must be framed as issues in dispute, which needs proof by evidence.

In this case, the claim was made known to the defendant, by allowing the plaintiff to explain, and after explaining the defendant response was that he admitted the debts, but not the whole amount alleged by the plaintiff in his claim as he had already started paying.

This admission in my considered view was incomplete because the defendant was not given chance to explain what amount, out of the claimed amount he was admitting to be indebted.

What followed, it was the plaintiff who was given a chance to explain, before he explained, that the debt was in three categories of Tshs. 6,320,827/= being the first Tshs. 3,043,250/= being the second and Tshs. 1,665,002 being the third totaling Tshs. 11,029,079/= as the principal amount together with Tshs. 8,360,337/= being interest and other incidental costs.

Thereafter, the court did not give the defendant opportunity to explain what among the principal amount, the interest and incidental costs he was admitting. Instead it went a head and rule that the defendant admitted the principal amount without that admission to be coming from the defendant himself, the court relied on the salary slip from the treasury which the record does not show that it was tendered. In my considered view, the trial court did not record what the defendant admitted, thus making the admission to be incomplete. That said, I find the appeal to be

merited basing on the 1st and 2nd ground of Appeal. The same is therefore allowed on these two grounds. Now that the two grounds have successfully managed to finalize the appeal, I find no logic in dealing with the rest of the grounds as succeeding or failing of those grounds will not change the result on the findings in respect of the 1st and 2nd grounds of appeal.

I therefore find that since the plea was not properly taken and recorded, then the matter be returned to the trial Primary Court to be tried *denovo* before another Magistrate with competent jurisdiction and a completely new set of assessors. Since the fault is of the court no order as to costs is made.

It is so ordered.

DATED at MWANZA on this 27th day of August 2020



J. C. Tiganga

Judge

27/08/2020

Judgment delivered in open chambers in the presence of Mr. Buberwa Advocate for Appellant who is also holding brief of Mr. Makwega Advocate for Respondent. Right of appeal explained and guaranteed.



J. C. Tiganga

Judge

27/08/2020

