

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CIVIL CASE NO. 10 OF 2013

SOSPETER MAGAMBO PLAINTIFF

VERSUS

MANG'ENI IBAGI DEFENDANT

JUDGMENT

13/10 & 06/11/2020

RUMANYIKA, J.:

In this one, by all standards a backlog case we had Sospeter Magambo (the plaintiff) who, against Mang'eni Ibangi the (defendant) claimed shs. 137,000,000/= being refund of business capital he entrusted the defendant his shop assistant between 2005 and 2010 but the latter breached the agreement one having had, on 19/06/2020 the Court of Appeal of Tanzania quashed the decision of this court dated 25/08/2017 and ordered a retrial.

The issues from the outset framed by the parties, which the court adopted on 09/07/2020 were: - **(1)** who between the parties owned the disputed Mwanza shop (the shop) **(2)** whether with respect to the shop the defendant received the start-up capital from the plaintiff and how much **(3)** whether the defendant mismanaged and he converted the plaintiff's funds into his use **(4)** whether the defendant sold to one Shirima the plaintiff's motor vehicle Reg. No. T.689 ASR make Mitsubish Canter for shs.

12.0 million and he converted the proceeds into his own use **(5)** the reliefs the parties are entitled to.

Unlike the defendant who appeared in person, Mr. Sayi learned counsel appeared for the plaintiff.

The plaintiff (the sole prosecution witness- (52)) stated that with initial capital of shs 30.0 million the defendant, his nephew was his shop assistant in Mwanza, Liberty street since 2015 and Muna Advocate attested the respective tenancy agreement (Exhibit "P1") one having begun in 1996 at Kiabakari Musoma but orally because of their blood tied relationship. Only God know and all the time t/a Mang'eni Ibangi the TIN number also read as such and he (the plaintiff) always gave guidance/direction (copy of the ledger – Exhibit "P2"). That having agreed each other in 2006 he mortgaged his house Plot No. 90 Block "A", Musoma – Baruti Street for an overdraft loan of shs. 23.0 million he injected it into the business (copy of the loan agreement-Exhibit "P3") that irrespective of the lucrative business the capital raised to shs. 34.5 but the defendant did not repay the loan and, in order to save his house having been served with the demand notice by bank from his pocket he repaid the loan (copies of the notice and the deposit receipt – Exhibit "P4") collectively leave alone the defendants' commitment to pay before (Exhibit "P7").

That like that one was not enough, the defendant sold the plaintiff's motor vehicle make Mitsubish Canter Reg. No. 689 ASR for shs 12.0 million yet he converted the proceeds into his use (copy of the Motor Vehicle Reg. Card – Exhibit "P5"). That now in order to officiate and put it to legal force

, in 2010, the parties executed that though in the defendant's name, still the shop belonged to the plaintiff (copy of the document – Exhibit "P6") having bought the defendant Plot No. 126 Nyasaka area in town and a motor vehicle make Toyota Hiace.

That the shop earned shs. 800,000/= per month hence shs. 137,000,000/= claims. I shall pray that the court declare me owner of the shop with costs. The plaintiff further contended.

The defendant also the sole defence witness (40) he stated that when he was class VI in the home village he got capital from father he commenced grain business until in January 1996 when the plaintiff engaged him as a shop assistant at Kiabakari, Butiama district with capital of shs. 1.0 million, and as in 1998 the shop stood at shs. 4.80 million, the plaintiff was for that reason satisfied therefore transferred him to another shop at Musoma now for wage of 30% of the proceeds. That as they parted company he paid him shs. 360,000/= per annum but in 2000 – 2001 the shop capital stood at shs. 104.0 million, he married in 2002 only blessed and permitted by father (copy of the permit-Exhibit – "D1") but in 2004 the stock taken read shs. 200.0 million, now for 9⁷/₁₂ years he (the defendant deserved shs. 60,000,000 being 30% of the stock but there in between in April, 2005 he paid him only shs. 19.40 million.

That on his own he shifted to Mwanza, Liberty Street (one Mwajuma Abdallah his Land Lady) that the plaintiff only played the role of advisor/mentor and out of the wage balance of shs. 60.0 million, the latter had paid rent of shs. 4.80 million all this in the defendant's name (copies of

the TIN number and Business licence – Exhibits “D2” and “D3”) respectively. With respect to him and family they had residence at Buzuruga area, Mwanza (copy of lease agreement of 2005-Exhibit “Id 5” that in his name he ran NBC Account No. 015103006905. That because of some financial difficulties he did not repay the bank loan because yet still the plaintiff owed him balance wages of shs. 12.40 million. That on 18/05/2012 he gave shs. 23.0 million for the plaintiff to repay the said bank loan. That as the plaintiff had a business trip to Dubai in 2007 too, the defendant sent him some money to buy him an assortment of goods inclusive of, but only in the plaintiff’s name a motor vehicle make Toyota Canter. That on 19/01/2009 in his name he purchased online from Dubai a motor vehicle make Toyota Hiace (copies of TRA documentation and cash sale receipt – Exhibits “D6” and “D7” respectively but at a later stage he sold the motor vehicle and accordingly handed over the proceeds to the plaintiff orally. That following the dispute, the clan members attempted to it but they failed to reconcile them. I pray that the suit be dismissed with costs. The defendant rested his case.

Cross examined by Mr. Sayi learned counsel the defendant stated that with respect to 30% balance of the wages, the same was not pleaded in his written statement of defence or something and that with regard to the shop, whereas the plaintiff signed it as director, the defendant signed the agreement as manager not the owner. That is all.

At least it has not been disputed; **(a)** that in 1996, it appears based on their blood ties the plaintiff engaged his nephew the defendant as shop assistant at Kiabakari, Butiama district **(b)** that they did not reduce the

principal and agent agreement in writing until it became sour as late as 31/01/2010 (Exhibit "P6"). Whereas the plaintiff signed it as Director, the defendant signed it not as owner of the business but a mere manager (c) the business having been shifted to Liberty Street Mwanza, the plaintiff paid rent of shs. 4.80million. Leave alone the bank loan of shs. 23.0 million Again the plaintiff injected the sum into the shop (Exhibit "P3"). Between them, with arrangements that out of the shop business the defendant repay the loan and, on default, but in writing the defendant committed himself to pay (Exhibit "P7") with the above stated consensus therefore, it could not have been intended or even reasonably anticipated that the shop belonged to the defendant.

Moreover, I entertain no doubts that either by design or just casually like, in passing it was put by the plaintiff, from its inception the parties might have had it in mind that they traded only in the name of Mang'eni Ibagi. That is why now having that in mind on 15/12/2010 the defendant secured a loan from FINCA only for personal business as he no longer used the name Mang'eni Ibagi but – **Mang'eni Ibagi Nyambusa.**

Being the shop assistant to the plaintiff, if at all the latter might have owed the defendant shs. 12.0 million or more being the agreed 30% of the profit therefore the wage arrears yes, but as clearly confessed by him, the defendant did not anywhere plead the counter claim leave alone the proposed issues. It sounds to me that the claim was but afterthought much as it is settled law that not only parties are bound by their pleadings but also the courts of law decide cases only basing on issues framed in court and adopted as part of the records.

In the upshot the suit succeeds in its entirety. For avoidance of doubts therefore, Issue No. 1 is answered only in favour of the plaintiff; Issue numbers 2, 3 and 4 are answered in the affirmative. The defendant pay the plaintiff; **(a)** shs. 137,000,000/= (One hundred thirty seven million only), **(b)** 30% of the decretal sum **(c)** 7% court rate interest on the decretal sum (d) general damages of shs. 50,000,000/= (Fifty million only) **(e)** costs of the case. It is so ordered.

Right of appeal explained.




S. M. RUMANYIKA

JUDGE

01/11/2020

Judgment delivered under my hand and seal of the court in chambers
this 06/11/2020 in the presence of both parties in person.


F. H. MAHIMBALI

DEPUTY REGISTRAR

06/11/2020

