IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MUSOMA DISTRICT REGISTY)

AT MUSOMA

(PC) CIVIL APPEAL NO. 57 OF 2019
(Originating from Civil Appeal No. 62 of 2019 in the District of Musoma at Musoma)

1. **CHARLES MTIMBA MAKUNJA ..... 1ST APPELLANT**
2. **ALFRED MTIMBA MAKUNJA .....2ND APPELLANT**

VERSUS

LEAH MAGOTI NTANDU ..... RESPONDENT

JUDGEMENT

9th and 31st March, 2020

KISANYA, J.:

At Musoma Urban Primary Court, the appellants were sued for debt recovery of Tshs. 800,000/=. The said suit was dismissed for want of merit. The respondent successful appealed to the District Court of Musoma at Musoma which reversed decision of the trial court. The appellants were ordered to pay the sum of Ths. 800,000, as claimed by respondent.

Dissatisfied, the appellants have filed an appeal before this Court. The petition of appeal has seven grounds appeal which can be summarized in four grounds as follows:

1. That the respondent was represented by Venansia Lucas contrary to

Order III, r. 1 and 2(a) of the Civil Procedure Code.

2. That, the Respondent and her witness (PW2) have concealed the truth in spouse relationship between (her daughter and the 1st appellant) which prompted her to send the money directly to the 1st appellant caused the Respondent not be clear who is the actual debtor between the two appellants.
3. The date on which the 2nd appellant asked for money from the respondent is contrary to the date stated by the respondent in Civil Case No. 157/2019 before Musoma Urban Primary Court.
4. That the case was not proved on the balance of probabilities.

It is important to depict, albeit brief, what prompted this appeal. According to the respondent (plaintiff), the 2nd appellant requested for a loan of Tshs 800,000 to pay collage fees for the 1st appellant. It was agreed that, the 2nd appellant would repay the money within one year. Basing on that undertaking, the respondent deposited Tshs. 800,000 in the 1st appellant's account on 13.11.2014. Despite several demands by the respondent, the 2nd appellant failed to repay the loan/debt. Therefore, the respondent instituted a suit for recovery of debt,

In his defence, the 1st appellant admitted to have received the money from the respondent. However, he averred that the said sum of money was for the respondent's daughter (PW2) who was living with him as spouse. On his part, the 2nd appellant denied to have asked for the loan.

The trial court was satisfied that the respondent had failed to prove her case on the balance of probabilities. Its decision was based on the account that PW1 and PW2 were not credible witnesses.

The first appellate Court reversed the decision of the trial court. It was

satisfied that the case filed in the trial court was not res judicata because in Civil Case No. 157 of 2019, the Court had directed the respondent to sue the proper party. Further, the first appellate court was of the view that, had the respondent wanted to send money to her daughter she would have deposited in her (PW2) account. The Court held further that there was no evidence to prove that the 1st appellant and PW2 were lovers.

At the hearing of this appeal, the appellants appeared in person while the respondent enjoyed the legal services of Mr. Kulwa Sanya, learned advocate.

The 1st appellant submitted the grounds of appeal jointly. He contended that during appeal, the respondent was represented by Venancia Lukas Mtandu contrary to the law. The 1st appellant submitted further that there was no evidence to prove the loan agreement between the respondent and the appellants. He argued that, although the money was deposited in his account, the same was handed over to PW2 as directed by the respondent.

Furthermore, the 1st appellant claimed that he was living with PW2 as spouse and that the dispute started when they separated. He contended that he was reported to the police on the allegations of stealing PW2's properties. The 1st appellant argued that PW2 was not credible witness because she denied to have lived with him. He therefore urged me to allow the appeal, quash and set aside the judgement of the first appellate court.

On his part, the 2nd appellant argued that the first appellate court failed to consider that the case was res- judicata as the claims against him had been dismissed in Civil Case No. 157 of 2019. He requested to adopt the petition of appeal.

In reply, Mr. Sanya submitted that the respondent was not supporting the appeal. On the first ground of appeal, Mr. Sanya argued that Vanencia Lucas Mtandu was issued with a power of attorney to represent the respondent.

As to the second ground of appeal, Mr. Sanya argued that Civil Case No. 157 of 2019 was not relating to the claims at hand. He elaborated that Civil Case No. 157 of 2019 was between the 2nd appellant and the respondent, while the present case was instituted against the both appellants. The learned counsel contended further that the court had directed the respondent to institute a case against the proper party. It was argued further that the loan agreement was negotiated by the 2nd appellant and their agreement was based on fiduciary relationship.

On the 3rd, 4th and 5th grounds of appeal, Mr. Sanya was of the view that the respondent case was proved on the balance of probabilities that, Tshs. 800,000 was deposited in the 1st appellant's account.

Regarding the 6th and 7th grounds of appeal, the learned counsel submitted that Civil Case No. 157 of 2019 was not relating to the case at hand. He argued further that it was not proved that, PW2 was wife of the 1st appellant and that the said issue was raised to defeat justice. Mr. Sanya contended further that, if the money was intended for PW2, the respondent could have deposited the same in PW2's account. For the aforesaid reasons, Mr. Sanya advised me to dismiss the appeal with costs.

In his rejoinder, the 1st appellant submitted that, Civil Case No. 157 of 2019 relates to the case at hand (Civil Case No. 244 of 2019). As to the relationship with PW2, the 1st appellant argued that the same is relevant because the respondent deposited the money in his account basing on such

relationship. On his part, the 2nd respondent submitted that the respondent is his relative. Any dispute between them, if any was supposed to be reported to the clan members. He reiterated that the case was instituted after arising of matrimonial dispute between the 1st appellant and PW2.

I have considered the evidence on record, petition of appeal, reply to petition of appeal and submissions by the parties, the main issues are whether the Vanancia Lucas Ntandu had *locus standi* to represent the respondent; whether the case was res judicata; and whether the respondent proved her claims on the balance of probabilities.

Starting with the first issue, the appellants argue that the respondent was represented by Venansia Lucas Ntandu contrary to O.III, r. 1 and (2) (a) of the Civil Procedure, Cap 33 R.E. 2002. It is trite law that the Civil Procedure Code does not apply to matters originating from the Primary Court. Therefore, the cited provisions are not applicable in the matter at hand. However, according to rule 14 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, 1964, at the hearing of appeal originating from the Primary Court, parties may be represented an agent. This includes an advocate, relative or any member of the household of the party, upon the request of such party. This is pursuant to rule 2 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, 1964 read together with section 33 of the Magistrates Courts Act [Cap. 11, R.E. 2002].

It was not disputed by the Respondent that that Venancia Lucas appearing at the hearing of appeal. However, that fact is not reflected in proceedings. The proceedings are written as if the respondent appeared in person. The first appellate court was required to record the person who appeared on

behalf of the respondent.

The next question is whether the said Venancia Lucas was authorized to represent the respondent. As stated herein, relative or member of household of the party to the case, may appear if the said party so requests. The record does not show whether the respondent requested to be represented by Venancia Lucas. She appeared by virtue of power of attorney signed on 17th June 2019 by the respondent authorizing her to conduct Civil No. 244 of 2019. It is on record that Civil Case No. 244 of 2019 is a case filed in Musoma Urban Primary Court. There is no document to prove that the said Venancia Lucas was authorized to conduct Civil Appeal No. 62 of 2019. Therefore, I hold that the said Venancia Lucas had authority to represent the respondent in appeal Civil Appeal No. 62 of 2019 before the District Court.

This brings me to another question whether the proceedings before the first appellate court were vitiated by the said irregularity. I have noted that the power of attorney was issued at the time when judgement in respect of Civil Case No. 244 of 2019 had been delivered in favour of the appellants. Therefore, it implies the respondent wanted Venancia Lucas to represent her in matters related to the said case. That is why the power of attorney read *"I hereby authorize my said attorney... to appear to any court and argue my care (sic) as me necessary..."* Therefore, considering the need of ensuring substantive justice, I am of the considered opinion the proceedings before the first appellate Court were not vitiated the said irregularity. This is in accordance with section 37(2) of the Magistrates Courts Act which provides that:

"No decision or order of a primary court or a district court under this Part shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, or any process or charge, in the proceedings before or during the hearing, or in such decision or order or on account of the improper admission or rejection of any evidence, unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice."

I now move to the second issue whether civil case filed in the primary court was *res judicata.* The provision of rule 11 of the Primary Courts Civil Procedure Rules, 1963 bars the plaintiff from instituting another suit involving the same parties and cause of action. The rule states as follows:

Where in any proceeding before a court, the court is satisfied that any issue between the parties has already been decided by the court or by any other court of competent jurisdiction in another proceeding between the same parties, the court shall not try the issue but shall try the other issues, if any, involved in the proceeding.

The Courts in Tanzania have in various decisions stated on the applicability, rationale and scope of the principle of res judicata. For instance, in the case of **Zanzibar Telecom Co. Ltd vs Haidary Y Rashid t/s Nasaria Enterprises**, Commercial Case No. 2 of 2009, High Court of Tanzania, Commercial Division, (unreported), this Court (Bukuku, J.) held as follows on the scope and rationale of the principle of res judicata:

"Primarily it applies as between past litigation and future litigation when a matter, whether on a question of fact or of law, has been decided between the same parties in one suit or proceedings, and the decision is final, either because no appeal was taken to a higher or because the appeal was dismissed or no appeal lies neither party will be allowed future suit or proceedings

between the same parties to canvass the matter again."

Guided by the above legal position, I have read the judgement in Civil Case No. 157 of 2019 and Civil Case No 244 of 2019 both filed in Musoma Urban Primary Court. While reading the two judgements, I have noted that the defendant in Civil Case No. 157 of 2019 is Alfred Mtimba Makunja only. On the other, Civil Case No. 244 of 2019 has two defendants namely, Charles Mtimba Makunja and Alfred Mtimba Makunja. Thus, I find and decide that the parties in the two case are different.

Then I have examined whether Civil Case No. 157 of 2019 was heard and finally determined on merit. As pointed out by Mr. Sanya and held by the first appellate court, in Civil Case No. 157 of 2019, the respondent was directed to file a suit against the proper party. Therefore, it was not heard and finally determined on merit.

In this respect, I agree with the first appellate court and Mr. Sanya that, Civil Appeal No. 244 of 2019 which is subject of this appeal was not res judicata.

The last issue on the ground of appeal is whether the respondent's claims were proved on the required standard. Pursuant to regulation 1(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1963, the claimant is duty bound to prove all the facts necessary to establish the claim unless the other party (that is the defendant) admits the claim. The standard of proof is provided for under regulation 6 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, which reads:

"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, ***but it***

shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other." *(Emphasize is mine).*

Applying the above position of law, it is not disputed that the respodent deposited Tshs 800,000 in the 1st appellant's account. The issue is whether the money was given as a loan to the 2nd appellant. Mr. Sanya submitted that the loan was negotiated by the 2nd respondent who instructed that the money to be deposited in the 1st appellant's account. On the other hand, the 2nd appellant denied to have requested some money from the respondent. Further, 1st appellant stated that the money was handed over to PW2.

In its decision, the trial court was convinced that, the claim was not proved as the respondent (PW1) and her witness (PW2) were not credible witnesses. The trial court held as follows on such finding:

> *"Kwa ushahidi uliopo kwa upande wa mdai Mahakama imeptawa na mashaka katika kuuamini na kuutumia kuthibitisha madai haya, kwani unonekana umeficha mambo mengi. Kitendo cha shahidi wa mdai kumkana aliyewahi kuwa mwanaume wake, kukana kabisa kutomtambua, kukana kuwa hakuwahi kuzaa nae wakati inaonekana wana mototo kinapa mashaka makubwa Mahakama na ushahidi unaotolewa na upande wa mdai. Imethibitika uwepo wa chuki kubwa baina ya familia hizi mbili na hata kupelekea mashahidi kuihadaa mahakama."*

It is trite law that the trial court finding as to credibility of witness is binding on the appellate court unless there are reasons to the contrary. This position was stated in **Omary Ahmed vs R.** (1983) TLR 32, when the Court of Appeal held:

> *"The trial Court's finding as to credibility of witnesses is usually binding on*

an appeal court unless there are circumstances on an appeal court on the record which case for a reassessment of their credibility".

Similar position was held in the case **Jacob Tibifunga vs R.** (1982) TLR 125 and **Antonio Dias Caldeira vs Frederick Augustus Gray** (1936) 1 ALL ER 540).

The first appellate court in the case at hand, reversed the findings of the trial court by relying on evidence of the respondent and PW2. The reasons are stated in the judgements as follows:

"In my view if the appellant wanted to send the money to her daughter she would have sent it direct to her daughter's account...the respondent are (sic) just trying to diverge from their liability, it could not be possible for the appellant to send the money to her daughter's lover since there is no evidence that the appellant's knew the 1st respondent as her daughter's lover, the appellant proved to know the respondents all together as their relatives that is why the 2nd respondent asked for the money for collage fee to his son from the appellant and not otherwise."

I have read the evidence on record, PW2 stated that he had an account because she is a civil servant. However, this evidence was countered by the 1st appellant when he testified that PW1 was employed in 2015. PW2 did not state her account and when the same became in operation. Thus, I find that it was not proved that PW2 had account by 13.11.2014 when the money was deposited in the 1st appellant's account for the first appellate court to hold that the respondent would have deposited the money is PW2's account.

Further, the first appellate was convinced that PW1 was credible witness on the ground that she was not aware of the relationship between PW2 and

the 1st appellant. It is on record that when the 1st appellant was cross-examined by the respondent, he replied as follows:

> *"...tulipoanza kuishi wewe ulinipigia simu ulikuwa na ghadhabu..mimi nilikuwa naishi na mtoto wako.*

Furthermore, I have shown herein that the PW1 and PW2 were found not credible witness as the trial court noted grudges between the parties. When cross examined by one of the assessors, the 1st appellant replied *"sisi na familia zetu zina mahusiano, mgogoro wetu, umekuwa kama uhasama wa kifamilia."* The issue that the appellants and respondent had grudges was not addressed by the first appellate court.

In this regard, I am of the considered opinion that the first appellate did not address all reasons advanced by the trial court in finding PW1 and PW2 not credible witnesses.

Lastly, there is no evidence to prove the loan agreement between the 2nd appellant and the respondent. No witness was brought to prove the oral agreement between the two parties. The fact that the money was deposited in the 1st appellant' account is not in itself sufficient to prove that the said amount was a loan advanced to the 2nd appellant. Therefore, the respondent's case was not proved on the required standard.

For the aforesaid reasons, I find merit on the appeal. Consequently, I quash and set aside the judgement of the first appellate Court. I make no order as to costs due the nature of this case where parties are relatives.

Order accordingly.

DATED at MUSOMA this 31st day of March, 2020.

E.S. Kisanya
JUDGE
31/3/2020