

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO. 20 OF 2020

(Arising from Kilwa District Court in Civil Appeal No. 2 of 2019. Original Pande Primary Court Civil Case No. 1 of 2019)

OMARY HASSAN YUSUPHAPPELLANT

VERSUS

HASSAN ABDALLAH NYUGA.....RESPONDENT

JUDGMENT

13 May & 1 June, 2021

DYANSOBERA, J.:

The appellant Omary Hassan Yusuph and the respondent Hassan Abdallah Nyuga are relatives. On 7th day of January, 2019 the respondent sued the appellant before the Primary Court of Kilwa District at Pande in a two-heads claim. The first component was a claim of Tshs. 9,700,000/= being capital and profit and the second component was Tshs. 720,000/= being the value of six hundred (600) bricks. The source of the claims was

the business arrangement that existed between the two. At the trial court, the appellant admitted the second part of the claim but denied the first part. After a full trial, the appellant was condemned to pay Tshs. 720,000/= to the respondent, the former had admitted. The respondent's claims of Tshs. 9,700,000/= was, however, dismissed for lack of proof. He was aggrieved by that finding and appealed to the District Court vide Civil Appeal No. 5 of 2019 and his appeal was partly allowed in that he was awarded a sum of Tshs. 7, 200,000/= as his entitlement.

The appellant was not satisfied with the first appellate court's decision hence this appeal. In his petition of appeal, the appellant is armed with two grounds of appeal as follows:-

1. That, the first appellate court erred in law and in fact by judging in favour of the respondent who was failed to prove his allegation before the trial court to the required standards in civil cases
2. That, the first appellate court erred in law and by allowing the appeal by the respondent and awarding him Tshs. 7, 200,000/=(Seven Million, two hundred thousand shillings) which was not proved by the respondent before the trial court.

At the hearing of this appeal, Messrs. Mshamu Mohamed Nganogera, Noah Omary Mwakisisile and Michael Lugina, learned Advocates, stood for the appellant, in the time, the respondent was represented by Mr. Nobert Rainery Songea, learned Counsel.

Arguing in support of the first ground of appeal, Mr. Mshamu Mohamed Nganogera submitted that the respondent failed to prove on preponderance of probabilities, as required under sections 3 (2) and 110 (2) of the Evidence Act, the existence of partnership relationship between him and the appellant. Dilating on the principle governing proof in civil cases, Mr. Nganogera relied on the following court decisions: **Matage Musiba v. Mtani Mugo**, Misc. Land Case Appeal No. 75 of 2014, **Geita Goldmining Ltd and Managing Director GGM v. Ignas Athanas**, Civil Appeal No. 227 of 2017, **Barelia Karangirangi v. Asteria Nyalwambwa**. (CAT) Civil Appeal No. 237 of 2017 and the case of **Anthony M. Masanga v. Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014.

As to the legal definition of partnership, Mr. Nganogera cited section 19 (1) of the Law of Contract Act [Cap. 345 R.E.2019] particularly on the specific words of profit, relationship and view of profit. He contended that

the appellant failed to prove that he was in relationship with the respondent, failed to know when their joint business started and was not inconsistent. Learned Counsel clarified that under section.... of the Law of Contract Act, the words used are carrying business in common has some ore than working together. It was further argued that the appellant was seen to have more duties than the respondent and the latter was not involved in operations of that so called partnership including the fact that the respondent was not even aware on how the land, which is claimed to be a partnership property was bought. Mr. Nganogera further submitted that the license was acquired in the name of the appellant only and that the evidence shows that the appellant was much involved in the management of the business than the respondent was.

On the profit being the main ingredient of the partnership, Mr. Nganogela argued that parties must be engaged in the distribution of profit obtained from the business. He cited the Kenyan case of **Joseph Chesire Sirma v. Erick Kipkurgat Kiprono**, Civil Case No. 45 of 204 (OS). Further, reference was made to the evidence of Shia Hassan Omary and Amida Ismail Shewaji and stressed that the respondent was not involved in the distribution of profit attained in the business. Mr. Nganogela further

submitted that the testimonies of the respondent and his witnesses was only speculative on what the parties' relationship entailed and there was no evidence proving partnership. On the rules and regulations for determining the existence of partnership Mr. Nganogera cited section 191 (1) of the Law of Contract Act and the case of **Anthony Ngoo and Davis Ngoov. Kitinda Kimaro** , (CAT) Civil Appeal No. 25 of 2014.

Mr. Songea, in response, supported the submission that the proof in civil cases is on balance of probabilities and that under sections 3 (2), 110 and 11 of the Evidence Act, he who allege must prove. He argued that the evidence adduced by the respondent and his witnesses proved that the partnership business between the parties existed. He elaborated that while the appellant contributed Tshs. 1, 500,000/=, the respondent also contributed Tshs. 1,500, 000/= on the lack of knowledge by the respondent on when the business started, learned Counsel for the respondent said that that was not fatal. Replying on the lack of proof of partnership by documentary evidence, Mr. Songea explained that since that was a formal business, the absence of document was inconsequential, particularly where the evidence clearly proved the existence of partnership relationship between the parties. Mr. Songea persuaded the court to

distinguish the cases cited by learned Counsel for the appellant and the present case. He concluded his submission by informing the court that the respondent discharged his burden of proving his case to the required standard. According to him, the evidence of the respondent was direct, connected and corroborated and was heavier than that of the appellant.

With regard to the second ground of appeal, Mr. Songea submitted that the awarded sum was not termed by the District Court as specific damages; rather it was general damages which was awarded at the court's discretion. The awarded amount of Tshs. 7, 200,000/= out of. 9, 200,000/= was both capital and profit which was the respondent's entitlement upon his participation in the business.

Messrs. Noah Omary Mwakisile and Michael Lugina, learned Advocates had brief rejoinders.

Mr. Noah said that SM 2 and SM 3 were shop keepers and at the same time SM 2 was the respondent's wife and there is a time she stopped. Mr. Noah argued that SM 2 instead of going to hand over the business to the respondent who was her husband, she handed over to the appellant all matters relating to business meaning that the respondent was not a partner. Counsel insisted that the elements of partnership spelt out

under section 191 of the Law of Contract Act were not established and that the respondent had no right to profit from what he had not contributed.

On his part, Mr. Michael Lugina said that the amount of Tshs. 1, 500,000/= being a great sum, there had to be a written document to prove the handing over and that when a business is registered, both parties are duty bound to produce licenses. He prayed this court to uphold the trial court's decision and quash with costs the decision of District Court. any proof to the it to the

Having read and understood the records of both the trial court and first appellate court and after considering the grounds of appeal and the submissions in support and in opposition thereof, I now embark on discussing the grounds of appeal.

In the 1st ground of appeal, the appellant is complaining that the first appellate court erred in law and in fact in finding in favour of the respondent who had failed to prove his allegations to the required standard, Mr. Mr. Mshamu Nganogera pegged this ground on the provisions of section 190 of the Law of Contract Act [Cap 345 R.E.2019].

With due respect to learned Counsel, his submission has missed the point. On the relationship that existed between the appellant and respondent, the learned Resident Magistrate was clear and observed:

'This case originated from Pande Primary Court where the appellant had sued the respondent claiming for division of his share arisen (sic) from their **joint venture**'

(Emphasis supplied)

Surely, the relationship between the parties was a joint venture and not partnership as counsel for the respondent wanted the court to believe. As rightly submitted by Mr. Nganogera, the existence of partnership envisaged by the provisions of section 190 of the Law of Contract Act was not there. Only, a joint venture as found by the first appellate court. There is no dispute that a business arrangement can be either a full partnership or a joint venture. This depends on the intention of the parties, the facts of the case and the terms of the understanding. Indeed, in partnership, there must be a specific trade name which was not the case in the business arrangement between the present parties. In that respect, therefore, the argument by Mr. Mshamu Mohamed Nganogera that the parties had partnership relationship was, but a misconception.

Was the parties' business arrangement of joint venture proved?

I think the answer must be in the positive. It was part of evidence unfurled at the trial court that both the respondent and appellant started a joint business in 2015. The respondent told the trial court that both contributed Tshs. 1,500,000/= each as capital and that though the appellant was *mfungaji mali*, both were involved in the selling. The respondent further testified that the business started in his office but they then bought a piece of land; the appellant contributing Tshs. 400, 000/= while he, the respondent contributed Tshs. 400, 000/=. It was also in the respondent's testimony that in the construction he contributed 2,500, 000/= while the appellant contributed Tshs. 3,500, 000/=.

The appellant, on his part testified, *inter alia*, that in 2014 he had three shops but in February, he conceived an idea to open up another shop for selling building materials but lacked 'frames'. The respondent had two frames and upon inquiry, the appellant was told that the frame was jointly owned with his (respondent's) wife. They both agreed that the said business stall be given to the appellant. The appellant told the trial court that it was given to him gratuitously. The further evidence of the appellant indicated that the respondent left for him the stall for business purposes.

The appellant admitted to have received some working instruments from the respondent though he argued that it was on lending.

In his judgment, the learned Resident Magistrate was satisfied that the evidence of the respondent was supported by that of PW 2 and PW 3 on the parties joint business and in the end awarded the respondent Tshs. 7,200, 000/= being his entitlement he deserved.

With respect, the learned Resident Magistrate cannot be faulted in this fair and just finding. It cannot be gainsaid that a joint venture may have 50 to 50 ownership or even 60 to 40 depending on the co- adventurer having more control in the decisions and earning a greater share. In other words, the contribution of the parties need not be equal or of the same character but there must be contribution by each co-adventurer of something promotive of the business arrangement. This is exactly what the case was in the instant matter. With that finding, I am satisfied that the respondent managed to prove the existence of the joint venture business relationship but their contribution and control of the business was not on equal basis. The argument that the respondent had failed to prove his allegation before the trial court to the required standard in civil cases is wanting in merit, particularly where it is clear that the Counsel's argument

was based on a wrong premise, that there existed a partnership relationship instead of a joint venture.

As said above, parties are relatives. It seems the potential conflict arose between the parties due to the communication between the parties being weak and the work and resources were not distributed equally.

With this observation, I find no substance in the first ground of appeal.

As far as the second ground of appeal is concerned, the record is clear that the award of Tshs. 7,200,000/= was not special damages as Counsel for the respondent wanted the court to believe. In awarding the said amount, the learned Resident Magistrate observed at the last page but one that:

'The trial court order is altered to an extent the defendant shall also pay the appellant at a quantum of Tshs.7, 200,000/= that this court thinks he deserves an entitlement thereto'

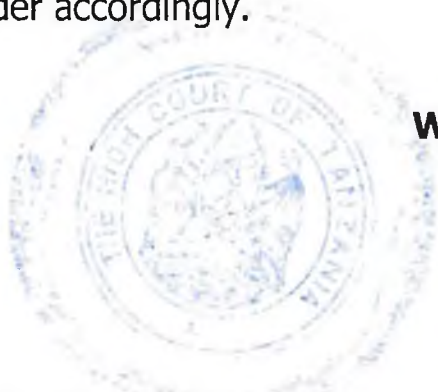
As rightly pointed out by Mr. Songea, the learned Resident Magistrate did not term the awarded sum to be special damages. It was, rather, damages awardable at the discretion of the court. In my view, the first appellate court exercised its discretion judiciously and judicially. I find no

material for interference. The complaint in the second ground of appeal falls away.

In short, the decision of the District Court was a result of correct apprehension of the evidence and the proper application of the relevant law. I find nothing to fault it.

For the reasons I have endeavoured to state, I find this appeal lacking in merit. The same fails and is dismissed with costs to the respondent here and in the courts below.

Order accordingly.



A handwritten signature in blue ink, appearing to read 'W.P. Dyansobera', is written over the seal.

W. P. Dyansobera

Judge

1.6.2021

This judgment is delivered under my hand and the seal of this Court on this 1st day of June, 2021 in the presence of the appellant and Ms Anisa Mziray, learned counsel for the respondent.

Rights of appeal to the Court of Appeal of Tanzania explained.



A handwritten signature in blue ink, appearing to read 'W.P. Dyansobera', is written over the seal.

W.P. Dyansobera

Judge