IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC CIVIL APPEAL NO. 15 OF 2021

JOHN AMBONYA ..... APPELLANT

VERSUS

BENASIUS WASHINGTON ..... RESPONDENT

(Appeal from the judgment of the District Court of Musoma at Musoma in Civil Appeal No. 57 of 2019)

JUDGMENT

12th July and 3rd August, 2021

KISANYA, J:

This appeal emanates from the judgment of the District Court of Musoma at Musoma in Civil Appeal No. 57 of 2019 dated 14th December, 2020, in which the appellant's appeal against the decision of the Musoma Urban Primary Court in Civil Case No. 161 of 2019 was dismissed for want of merit.

In summary, the context giving rise to the current appeal as gleaned from the evidence on record is that: On 24th March, 2010 and 8th April, 2010, the appellant took 270 and 177 cartons of roofing nails worth TZS 21,330,000 and 13,983,000 respectively, from the respondent. He promised to pay the latter by 22nd April, 2010. However, the appellant

defaulted to pay part of the debt. The amount remaining unpaid was TZS 9,085,000. The respondent had no option than filing a civil suit to recover the said TZS 9,085,000. That case was filed in the District Court of Musoma on 15th June, 2014 and ended in favour of the respondent. On appeal to this Court (Mwanza Registry), the decision of the District Court was quashed due to procedural irregularity. The respondent was advised to refile the case in a court of competent jurisdiction. The said decision was rendered on 15th August, 2017.

It was on 11th March, 2019 when the respondent instituted the case subject to this appeal. This time, it was in the Musoma Urban Primary Court. The appellant raised a preliminary objection on point of law that, the suit was time barred. His preliminary objection was overruled for want of merit. At the end of the trial, the trial court was satisfied that the respondent had proved the claim of TZS. 9,085,000. It went to order the appellant to pay the principal debt of TZS, 9,085,000, compensation to the tune of TZS 3,000,000 and costs for case to the tune of TZS 50,000.

Dissatisfied by that decision, John Ambonya appealed to the District Court. At the first, the appeal was heard by Hon. Ndira-RM who quashed the trial court's proceedings, judgment and order on the reasons that the suit was filed out of time. Following an appeal by Benesius Washington,

this Court (Kahyoza, J.,) found the proceedings of the District Court and the resultant judgment a nullity because parties were not invited to address on issue of time limitation which disposed of the appeal. The High Court ordered that the appeal to be heard denovo by another magistrate.

In that regard, the appeal was re-assigned to Hon. H.J. Masala-RM. One of the issues that featured during the hearing of the appeal before the District Court was time limitation. The learned appellate magistrate held that the suit before the trial court was not time barred. In the end, she was satisfied that the respondent had proved his case and went on to dismiss the appeal for want of merit.

Feeling that justice was not served to him, the appellant has approached this Court with a total of three (3) grounds of appeal to challenge the judgment of the District Court. The grounds are: **one**, the District Court erred on point of law and misdirected itself to allow and use of evidence that is not provided by the law; **two**, the appellate Court misdirected itself when it failed to re-evaluate and reassess the said evidence as the custom and norm of the 1st appellate Courts guide and directs; and **three,** since the alleged contract is oral, the 1st appellate Court misdirected itself on points of law and facts to rely on such hearsay evidence, to the detriment of the appellant.

During the hearing of this appeal, the appellant was represented by Mr. Thomas Makongo, learned advocate. On the other side, the respondent had the legal services of Mr. Amos Wilson, learned advocate. In the course of hearing the learned counsel's submission for and against the appeal, I probed them to address the issue whether the suit was filed in time before the trial court. Since that issue goes to the root of the case, I will determine it before addressing the grounds of appeal.

Submitting on the issue of time limitation, Mr. Makongo argued that the suit was filed out of time. He pointed out that much as the contract was entered in 2010 and a suit lodged in 2019 was beyond six (6) years specified under the Law of Limitation Act, Cap. 89, R.E. 2019 (the LLA). The learned counsel was of the firm view, although the High Court had ordered the parties to refile a fresh suit, the filing of new suit was subject to the law of limitation.

On the other hand Mr. Wilson submitted that the case was refiled by an order of the High Court. Referred the Court to section 21 of the LLA, the learned counsel argued that the time spent in court to prosecute the same case is excluded if that case was filed in good faith. He was of the view that, considering the time spent by the court in prosecuting the former, the case which gave rise to this appeal was filed within 6 years.

On my part, if find that parties are at one that this case is founded on contract. Therefore, in terms of paragraph 7 of Part I of the Schedule to the LLA, the time within to lodge a suit founded on contract is 6 years from the date on which the cause of action arose. Pursuant to paragraph 5 of the complaint (*hati ya madai*) lodged before the trial court and evidence of Benasius Washington (PW1), the cause of action arose on 22.04.2010. That is date on which the appellant agreed that he would have paid the money. That being the case, a suit found on the said agreement ought to have instituted on or before 21.04.2016. However, it is was on 11.03.2019 when the case subject to this appeal was lodged in the Musoma Primary Court. That was after 8 years and 11 months.

The learned counsel for both parties are not at issue that, prior to this case, the respondent had sued the appellant on a claim founded on the same agreement. In terms of paragraph 9 of the complaint (*hati ya madai*) read together with *Annex MS 5* appended thereto, the former suit was filed in the District Court of Musoma (Civil Case No. 12 of 2014) on 15.06.2014. It came to an end on 15.08. 2017 when it was decided on appeal by the High Court (Mwanza Registry) in HC. Civil Appeal No. 57 of 2016, and the parties advised to refile the same in the court of competent jurisdiction.

At this juncture, I agree with Mr. Wilson that, the time spent in prosecuting another civil proceedings against the same party for the same relief is excluded in computing time limitation. This legal requirement is provided for under section 21(2) of the LLA, which reads:

> *"In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."*

That being the position of law, the period between 15.06.2014 and 15.08.2017 is excluded in computing the period of six years within which the respondent was required to institute his suit. The said period is equivalent to three (3) years and two (2) months. Therefore, if that period is excluded from 8 years and 11 months (i.e from 22.04.2010, when the cause of action arose to 11.03.2019, when the present case filed in the primary court), it took the respondent five years and 9 months to lodge the present case. For the foresaid reason, I uphold the decision of the two lower courts that the case subject to this appeal was not time barred.

Reverting to the grounds of appeal, Mr. Makongo dropped the third ground. With regard to the first ground, he faulted the lower courts for considering copies of documents alleged to have been tendered by the respondent during trial. He went on to contend that the said copies were not tendered and admitted in evidence during trial.

Submitting on the second ground, Mr. Makongo argued that the first appellate court misdirected itself by failing to reevaluate and reassess the evidence adduced before the trial court. He pointed out that had the first appellate court examined the said evidence, it could have noted that Delivery Note No. 39 was issued to Tito Hadware Mwanza and not the appellant. Mr. Makongo urged the Court to step into the shoes of the first appellate court by examining the evidence adduced before the trial and expunge the said documents. He was of the view that, in the absence of the said exhibits there is no evidence to prove the respondent's case.

Responding to the first ground, Mr. Wilson argued that the photocopies were admitted under rule 11(1) of the Magistrate Courts (Rules of Evidence in the Primary) Regulations, 1964. He contended further that, even if the said documents are expunged, the respondent proved his case via evidence adduced by PW1, PW2 and PW3.

In respect to the 2nd ground, Mr. Wilson argued that the first appellate court reevaluated the evidence adduced before the trial. He went on to submit that the respondent proved his case.

In conclusion, Mr. Wilson urged the Court to consider the principle stated in **Abdallah Kilabwanda vs AbduL Ally Mnawa**, PC Civil Appeal No. 9 of 2019 (unreported) that, the second appellate court cannot interfere with concurrent findings of the lower courts unless there is misapprehension of evidence, miscarriage of evidence or violation of some principles of law or procedure. He was of the view that there was no reason for this Court to interfere with the concurrent findings of the lower courts and urged me to dismiss the appeal with costs.

Rejoining Mr. Makongo reiterated his submission that the first appellate court did not evaluate the trial court's evidence. He submitted further that the law governing admission of documentary evidence was not complied with and that PW1 and PW2 did not testify on the value of items taken by the appellant.

In the light of the above submission, I find the main issue for consideration being whether the respondent proved his claim on the balance of probabilities. It is on record that the two lower courts answered the said issue in affirmative. In other words, the two lower courts arrived

at the concurrent findings that, the respondent's case was proved on the required standard. This being a second appeal, I agree with Mr. Wilson that, the concurrent findings of the trial courts cannot be interfered with unless it is established that, there was a misapprehension of evidence leading to a miscarriage of justice or violation of principle of law or procedure. Apart from the case **Abdallah Kilabwanda vs AbduL Ally Mnawa** (supra) referred to this Court by Mr. Wilson, the said position was stated in **Fatuma Ally vs Ally Shabani**, Civil Appeal No. 103 of 2009 and (unreported), where the Court of Appeal held:-

> *"Where there are concurrent findings of fact by two Courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure. In other words, concurrent findings of facts by lower Courts should not be interfered with except under certain circumstances."*

In view of the above position, the first ground of appeal in relation to admission and or consideration of copies of documents suggests that there was a misapprehension of evidence or violation of some principle of law or procedure by the two lower courts. Reading from the judgement of the trial court, I find that Exhibits MS1 and MS2 were considered in

determining that the respondents had proved his case. During the first appeal, the appellant complained that the trial court had considered copies of documents. In its judgment, the first appellate court decided the matter as follows:

> *"The appellant's counsel also submitted to this Court that the annexure were the photocopies and were not certified thus contravened section 63 of the Evidence Act, Cap. 6. R.E. 2002. However, when looking at the alleged annexure this Court found that, all important documents were certified by different advocates and some by a magistrate."*

Therefore, it is clear that the findings of the two lower courts were premised on the copies of documentary evidence alleged to have been tendered by the respondent.

However, having gone through the proceedings of the trial court and evidence of PW1 in particular, I see no where the respondent prayed to tender any document. Although PW1 appended some documents to his complaint (*hati ya madai*), he was duty bound to tender them in evidence. This is pursuant rule 8(1) of the Magistrate Courts (Rules of Evidence in the Primary) Regulations (supra), which provides:

"8.-(1) *Facts are proved by evidence which may be:*

(a) N/A;

(b) the production of documents by witnesses (documentary evidence);

(c) the production of some other thing relevant to the case (real evidence), e.g. a rungu with which an assault is committed."

Since the respondent did not produce any document during his evidence, the trial court erred in considering that the appellant's claims was among others, proved by the Delivery Note and book of accounts (Exhibit MS1) and Brake Down of Money paid by John Ambonya (Exhibit MS2). Upon considering that the said evidence were not tendered in evidence, I find it not appropriate to discuss whether the same were original or not. However, for the sake of clarity, I wish to point out that, in terms of rule 11 (1) the original document must be produced. A copy of the original document may be proved if the original has been lost or destroyed or if it is in the hands of the opposing party and he will not produce it. There is no evidence that the exceptions provided for in rule 11 (1) were complied with. For the foregoing reason, I find merit in the first ground of appeal.

The question that follows is whether in the absence of the said documentary evidence (Exhibit MS1 and MS2), the respondent's proved his claim against the appellant. In my view, in the absence of delivery notes

and receipt there remains no evidence to substantiate the respondent claim's that the appellant took 270 cartons of roofing nails worth TZS 21,330,000 and 170 cartons of nails worth TZS 13, 983,000. Further to that the respondent did not tender receipts to show the amount paid by the appellant thereby leading to the balance of TZS 9,085,000 claimed in the suit lodged before the trial court.

In that regard, I am of the considered view that the respondent did not prove his claim against the appellant on the required standard. Had the first appellate court re-evaluated the evidence adduced before the trial court, it would not have upheld the trial court's decision.

In the final analysis, I find merit in this appeal and allow it. Accordingly, the judgments, decree and orders of the Musoma Urban Primary Court in Civil Case No. 161 of 2019 and District Court of Musoma in Civil Appeal No. 57 of 2019 are hereby quashed and set aside. The appellant shall have his costs.

DATED at MUSOMA this 3rd day of August, 2021.

THE HIGH COURT OF TANZANIA
MUSOMA

E. S. Kisanya
JUDGE

Court: Judgment delivered this 3rd day of August, 2021 in the presence of the parties. B/C Simon present.

An aggrieved party has a right of appeal to the Court of Appeal of Tanzania after filing the notice of appeal and obtaining a certificate from this Court that a point of law is involved in challenging this decision.

E.S. Kisanya.
JUDGE
03/08/2021