

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

AT MUSOMA

CIVIL APPEAL NO. 3 OF 2021

MANYI DAMAS APPELLANT

VERSUS

GEWA KYOBORI RESPONDENT

(Appeal from the decision of District Court of Musoma at Musoma (H.J. Masala-RM) dated 21st January, 2021 in Civil Case No. 10 of 2020)

JUDGMENT

12th and 30th August, 2021

KISANYA, J.:

The appellant in this appeal was the plaintiff at the District Court of Musoma in Civil Case No. 10 of 2020, in which the respondent was the defendant. He claimed for Tshs. 61,596,000 being special damage for the loss of income arising from the attachment and use of his cattle by the respondent for three years.

The facts giving rise to this appeal are that: The respondent initiated Criminal Case No. 11 of 2016 lodged at Zanaki Primary Court in which the appellant was convicted of two counts, namely, malicious damage to property and removing boundary marks with intent to defraud, contrary to sections 326 and 329 of the Penal Code, [Cap. 16, R.E. 2002], respectively. He was then sentenced to one year imprisonment. On appeal to the District

Court of Musoma in Criminal Appeal No. 57 of 2016, the custodial sentence was set aside. In lieu thereof, the appellant was sentenced to a conditional discharge to twelve (12) months. That was on 7th November, 2016.

Two years later, the respondent successfully sued the appellant at the Zanaki Primary Court in Civil Case No. 11 of 2018, on a claim for Tshs. 3,058,350 being compensation for the removal of the boundary marks. Subsequent to that decision, nine cows belonging to the appellant were attached by an order of Zanaki Primary Court. The appellant's appeal to the District Court was dismissed for want of merit. His second appeal was heard by Hon. Ngaile-RM with Extended Jurisdiction (as he then was) who nullified the proceedings of the Zanaki Primary Court in Civil Case No. 11 of 2018 and quashed and set aside the judgment and orders thereon. The learned RM with Extended Jurisdiction ordered the case to be heard afresh and the nine (9) cows to be returned to the appellant. Upon re-trial, the respondent lost.

The appellant resolved to institute the case at hand. He claimed that the attachment of his cattle was unlawful and that it caused him to suffer loss of Tshs. 61,569,000. On the other side, the respondent disputed the appellant's claims. He averred that the attachment was lawful and issued by the court of competent jurisdiction. At the end of trial, the appellant lost.

Dissatisfied, the appellant has now appealed to this Court on two grounds of appeal; namely:

Dissatisfied, the appellant has now appealed to this Court on two grounds of appeal; namely:

- 1. That the trial court erred in law and fact by holding that the appellant failed to prove his claim against the respondent though he proved his case on the balance of probabilities.*
- 2. That, the trial court failed to critically analyze the evidence adduced by the appellant; thus, it reached to the foresaid decision.*

When the matter was called for hearing, the appellant appeared in person, whereas the respondent defaulted to appear without notice. Therefore, the appeal was heard *ex-parte* under Order XXXIX, Rule 17(2) of the Civil Procedure Code [Cap 33, R.E. 2019].

Submitting in support of the appeal, the appellant argued that the respondent misled the court which issued the attachment order. He submitted that although the cows were returned to him by an order of the Resident Magistrate's Court of Musoma (Extended Jurisdiction), he was entitled to the loss suffered during the time which the cows were with the respondent. The appellant contended that the loss of Tshs. 61,596,000 claimed in the plaint was proved on the balance of probabilities. He therefore asked the Court to consider his evidence and allow the appeal.

I have considered the grounds of appeal and the submission by the appellant. In my opinion this appeal can be determined by considering the issue whether the appellant proved his case on the balance of probabilities.

The record bears it out that the appellant's case was premised on the contention that his cows were unlawfully attached. As rightly held by the trial court, the appellant's cows were attached in the execution of the judgment of Zankai Primary Court in Civil Case No. 11 of 2018 in which the appellant was ordered to pay a total of Tshs. 3,058,350. The proceedings, judgment and execution order of Zankai Primary Court in Civil Case No. 11 of 2018 were nullified, quashed and set aside by the Resident Magistrate's Court of Musoma (Extended Jurisdiction) because the assessors who sat with the trial magistrate were not involved as required by the law. The respondent cannot be blamed for the said anomaly.

Further to that, nothing suggesting that the respondent misled the trial court which issued the attachment order due to the following reasons: **One**, the appellant's conviction in Criminal Case No. 11 of 2016 lodged at Zankai Primary Court was not quashed. According to Exhibit P3, the District Court sentenced the appellant to a conditional discharge for twelve months in lieu of one year imprisonment. **Two**, since the appellant's conviction on the offences of malicious damage to property and removing boundary marks with intent to defraud was not quashed, the respondent was justified to institute the civil case to claim for the damages. **Three**, although the Resident Magistrate's Court of Musoma (Extended Jurisdiction) ordered that the herd of cattle be returned to the appellant, it also ordered that the civil

case instituted by the respondent be heard afresh. It is upon retrial when the respondent's civil case was found not meritorious.

Be that it may, I find no reason to fault the trial court's findings that the appellant's herd of cattle were attached by a lawful order issued by the trial court.

Even if it is considered that the attachment order was unlawful on the account that the respondent failed to prove his claim after retrial of his case, the next issue is whether the appellant proved the special damages of Tshs. 61,596,000. This is pursuant to the settled law in this jurisdiction that, special damages must be specifically pleaded and strictly proved. See for instance, the case of **Harith Said Brothers Company vs Martin s/o Ngao** [1981] TLR 327 where it was held that:

"...unlike general damages special damages must be strictly proved. I cannot allow the claim for special damages on the basis of the defendant's bare assertion when he could, if his claim was well founded easily corroborate his assertion with some documentary evidence. For all one knows, the defendant might have been incurring losses when he was running the bus. The claim for special damages must be, and is dismissed..."

Similar position was stated in the case of **Stanbic Bank Tanzania Ltd vs Abercrombie and Kent Tanzania Ltd**, Civil Appeal No. 21 of 2001 CAT (unreported) referred to by the trial court.

It is common ground that the special damages to the tune of Tshs. 61,596,000 were specifically pleaded in the case at hand. The appellant pleaded further the special damages arose from the loss incurred "following unlawful attachment and use of his cattle for three years." In view of the settled law, he was required to substantiate how he incurred the said loss of Tshs. 61,596,000. Did he exercise that duty? The answer to this question is reflected in his evidence. He testified as follows:-

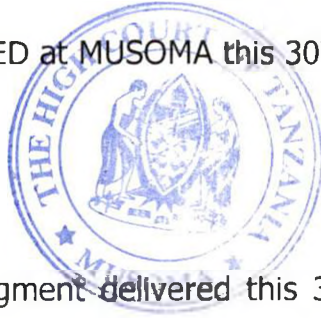
"After that I decided to file a case on the damages I incur...He lived with my cattle for about three years. Some of the cows were used for cultivation, and three cows were used for production of milk.

In all that period of time I was the victim of the circumstances, I failed to cultivate, I missed milk and manure. For that loss, I pray for the court to order him to pay Tshs 61, 596,000."

Having reviewed the above evidence, I entirely agree with the trial court that the appellant did not strictly prove the loss. He failed to account or prove how the loss of Tshs. 61,596,000 claimed in the plaint was arrived at. Therefore, the trial court could not allow the claim for special damages which was unfounded or its basis not deposed in evidence. It follows that the appellant's case was not proved on the balance of probabilities.

In the event, I find no merit in this appeal which I hereby dismiss. I make no order as to costs because the respondent did not defend the appeal.

DATED at MUSOMA this 30th day August, 2021.

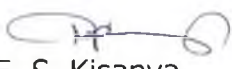



E. S. Kisanya
JUDGE

Court: Judgment delivered this 30th day of August, 2021 in the presence of the appellant and in the absence of the respondent. B/C Gideon- RMA present.

Right of appeal explained.




E. S. Kisanya
JUDGE
30/08/2021