

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

PC. CIVIL APPEAL NO. 29 OF 2021

(Arising from DC Civil Appeal No. 13/2021 from the District Court of Nyamagana originating from the decision in Civil Case No. 148 of 2020 of Mkuyuni Primary Court)

BAHATI NGUTUAPPELLANT

versus

JAPHET MAHONDARESPONDENT

JUDGMENT

30th August & 15th September, 2021

RUMANYIKA, J:

The 2nd appeal is with respect to judgment and decree dated 4/6/2021 of the district court Nyamagana quashing a decision and setting aside orders dated 16/2/2021 of Mkuyuni primary court (the trial court).

The 4 grounds of appeal revolve around two **(2)** points essentially;

- 1) That the 1st appeal court ignored the appellant's evidence.
- 2) That the 1st appeal court improperly evaluated the evidence on record.

When the appeal was, by way of audio teleconference called on 30/8/2021 for hearing, like Bahati Ngutu (the appellant), Japhet Mahonda

(the respondent) appeared in person. I heard them through mobile numbers 0767 622 955 and 0765 275 208 respectively.

The parties had nothing to submit. They only asked the court to consider what the petition of appeal and the reply thereto contained. That is it.

The evidence on record reads thus;

Sm1 Bahati Ngutu (now the appellant) is on record having had stated that as in May, 2018 the respondent needed shs. 5,000,000/= as capital for fish business, he lend him the money repayable within the first month but the latter defaulted alleged contrary to his expectations the business was difficult. Then they were agreed that the respondent pay shs. 500,000/= in installment but yet the respondent did not honor the promise instead for the first shs 500,000/= he asked to split it in shs. 300,000/= and shs. 200,000/= then Sm1 accepted it but reluctantly. That irrespective of two years repeated and several demands and efforts to amicably settle it, the respondent did not pay the outstanding balance of shs. 4,500,000/= hence the case. That is all.

Su1 Japhet Komanije Mahonda stated that actually both of them having had contributed shs. 5.0m each, with effect from February, 2018

the parties had a joint venture but for some reasons, inclusive of dishonest customers the fish business collapsed then equally orally on different occasions he (Su1) gave the appellant shs. 2,000,000/= and shs. 1,600,000/= which sum the latter never ever paid back. That is it.

Su2 Christopher Venance stated that at the request of the respondent who needed a business partner he connected the parties and they contributed shs. 5.0m each that is it.

Rightly so in my view, in her conclusion, but in favor of the appellant the learned trial resident magistrate reasoned as quoted hereunder;

... **Mdai amesisitiza kuwa yeye alimkopesha mdaiwa na ndiyo sababu mdaiwa alianza kumlipa na akafikia kiasi cha Tshs. 500,000/= ambazo mdaiwa alikubali kurejesha kwa awamu na baada ya hapo hakumlipa tena ... Lakini hakuna ushahidi wa maandishi kuonesha kuwa biashara kati ya mdai na mdaiwa ilikuwa ya ubia na iwapo wanapata hasara basi mdaiwa hakupaswa kumlipa mdai. Lakini pia mdaiwa mwenyewe amekiri kuanza kumlipa mdai kiasi cha Tshs. 500,000/= huku akiwa**

hana ushahidi kuwa kiasi hicho hakikuwa kufidia kiasi cha Tshs. 500,000/= **basi mahakama inaafiki kuwa fedha zilizotolewa na mdai zilikuwa ni mkopo kwa mdaiwa na siyo shea ya mtaji ... Hivyo mdaiwa anapaswa kumlipa mdai kiasi cha Tshs. 4,500,000/= iliyosalia kwenye kiasi cha Tshs. 5,000,000/=.**

Meaning that the appellant's allegations of not having had any fish business joint venture with the respondent but a loan agreement it was evidenced by the latter's act of, it appears out of shs 5,000,000/= in two installments having had paid the appellant shs. 500,000/=.

Quite in reverse however, in his words the 1st appeal court magistrate held and ordered;

... This court has the view that both parties were doing the same business after each party contributed Tshs. 5,000,000/= as capital of their business of buying and selling fish hence, **it was wrong for the trial court to order that such money was given to the appellant by the respondent as a loan...**

Between the parties, as gentleman's agreement as it might be, at least it was undeniable fact that following the appellant's several and repeated demands, on two different occasions the respondent paid the appellant shs. 500,000/= that the former did not, in his evidence tell the trial court if at all court the money was paid as joint business profit / dividend or something leave alone nondisclosure, if at all of the terms and conditions of the joint venture in the absence of such essential explanation therefore, like the learned trial resident magistrate held, the appellant's evidence weighed heavier than the respondent's.

It follows therefore that the plaintiff's case was on balance of probabilities proved. Had the 1st appeal properly evaluated the evidence and consider it all it would have arrived at a different conclusion.

In the upshot, I shall have no basis upon which to fault the trial court. The appeal is allowed with costs. The decision and orders of the 1st appeal court are quashed and set aside respectively. It is so ordered.

Right of appeal explained.


S. M. RUMANYIKA

JUDGE

10/09/2021

The judgment is delivered under my hand and seal of the court in chambers this 15/09/2021 in the absence of the parties.



S. M. RUMANYIKA
JUDGE
15/09/2021