IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 79 OF 2021

(*Appeal from the Ruling of Kibaha District Court in Civil Revision No. 10 of 2020, before Hon. F.L. Kibona -RM, dated 28th April, 2020). Originating from the execution order of Maili Moja Primary Court in Civil Case No 87/2016 dated 03/01/2020)*

GODWIN S. MARIKI.....APPELLANT

VERSUS

MARIO MAPUNDA..... 1ST RESPONDENT

BATISTA ELIAS KAHEMELE.....2ND RESPONDENT

JUDGMENT

21st Oct, 2021 & 3rd Dec, 2021

E.E. KAKOLAKI J.

This appeal traces its genesis from the decision of Maili Moja Primary Court in Civil Case No. 87 of 2016 dated 28/12/2016 and its execution order dated 03/01/2020, whereby appellant and 2nd Respondent were ordered to pay the 1st Respondent Tsh 6,804,000/= and the appellant's efforts to challenge the said order proved futile following dismissal of Civil Revision No. 10 of 2020 by the District Court of Kibaha dated 28/04/2020.

The brief background of this appeal as discerned from the record can be narrated as hereunder. Sometimes in 2016 the 2nd respondent lodged a claim with the Madukani suburb/kitongoji cha madukani chairman (appellant), seeking for the 1st respondent to vacate the business premises used by him as recreation center for video shows and pool table, in which the 2nd respondent claimed ownership. Upon hearing of both parties the suburb chairman (appellant) ordered the 1st respondent to vacate the place and hand over the business to the 2nd respondent. On refusal of the 1st respondent to heed to his order, the appellant as suburb chairperson while joining forces with 2nd respondent, unlocked the door of the 1st respondent's business center and handed it over to the 2nd Respondent with all its fixtures, video show devices and pool table appliances, in absence of the 1st respondent. Aggrieved by that act, the 1st respondent successfully filed Civil Case No. 87 of 2016 at Maili Moja Primary Court against both 2nd respondent and appellant whereby the court ordered both appellant and 2nd respondent to return the said properties to the 1st respondent in its judgment dated 28/12/2016. Unpleased with that decision the 2nd respondent unsuccessfully appealed to the District Court as luck was not in his side, so his appeal ended up being dismissed. Undauntedly, he unsuccessfully applied for extension of

time so as to appeal to this Court as the same was dismissed for want of proper Cause.

The record further reveals that, on 5th February,2018, 1st respondent applied for execution of the Maili Moja Primary Court judgment dated 28/12/2016, only to find that, the properties ordered to be restored to him were destroyed during construction of Morogoro road. Following that development, the Primary Court varied the order and ordered compensation in monetary form to the 1st respondent amounting to Tsh. 6,804,000/= to be paid jointly by the appellant and 2nd respondent. Aggrieved by that order and being time limited to challenge it, the appellant successfully applied for extension of time before he filed the Application for Revision to the District Court of Kibaha, Civil Revision No. 10 of 2020, on the grounds that; the execution orders issued by the Primary Court dated 24/10/2019 and 03/01/2020 ordering the appellant to pay jointly with the second respondent Tsh. 6,804,000 to the 1st respondent is against the Primary Court Judgment delivered on 28/12/2016, which ordered return of the disputed properties. And further that, the said order was directed to 2nd respondent only and did not extend to the appellant. The other ground was to the effect that, since the properties were destroyed by TANROAD, the 1st respondent had to join

TANROAD. And on the final ground he contended, he was sued under his personal capacity instead of being sued under official capacity as suburb chairman. Nevertheless, the District Court did not find any irregularity in the said primary Court decision hence dismissed the application in its ruling dated 28/04/2020. Dissatisfied with the fruits of the said Revision, the appellant has filed the present appeal armed with two grounds of appeal namely:

(1) The Resident Magistrate erred in law and facts to order the appellants to pay Tsh 6,804,000/= jointly with the second respondent in contravention of the Judgment of Mailimoja Primary Court in Shauri la Madai No 87 of 2016 by Hon L. Pagula, primary Court Magistrate of 28/12/2016

(2) The resident Magistrate erred in law and facts for his failure to address the issue of the appellant to be sued in his personal capacity instead of the Local Government Chairman.

The appellant prays this court to allow the appeal, quash the proceedings and set aside the ruling of the District Court of Kibaha at Kibaha in Civil Revision No 10 of 2020 with costs.

Hearing of the appeal proceeded by way of written submission upon leave of this court sought as both 1st and 2nd respondents were not represented while the appellant was represented by Mr. Symphorian R. Kitare, learned advocate. Arguing in support of the grounds of appeal, Mr. Kitare started by giving a detailed account on the background of the case. He then submitted, during hearing of the case at Maili Moja Primary Court, the appellant raised a preliminary objection on point of law that, the appellant was sued in person while in fact his liability arose from his employment engagement as the Local Government Chairman but the same was neither recorded nor addressed. He referred the Court to page 8 and 9 of the primary Court Judgment. According to him, appellant ought to have been sued in this case in his official capacity as the Local Government Chairman being the Maduka suburb chairman and not otherwise as provided for under section 26(2) (b) of the Local Government (District Authorities) Act, Cap. 287, the section which establishes the Village Council as Corporate hence capable of suing or being sued. He added that, appellant was denied of his right to notification within one month in contravention of section 183 of the Local Government (District Authorities) Act of 1982.

On the second ground of appeal the appellant faulted the District Court for upholding the Primary Court execution order which joined him together with the 2nd respondent in compensating the 1st respondent to the tune of Tsh 6,804,000/=. According to him the said order contradicts the decision of Shauri la madai No. 87/2016 where the order for return of the 1st respondent's properties did not cover Appellant. According to him, the decision in the above cited case dated 28/12/2016, ordered the 2nd respondent alone to return the alleged properties to the 1st respondent, but to the appellant's surprise the execution order issued on 03/01/2020 for payment of money to the 1st respondent in lieu of the properties extended to him. He said, this was after the alleged properties were found to have been wasted/destroyed during road construction by TANRODS. Mr. Kitare was of the view that, the District Court was entitled to find, the second order for monetary compensation ought to have strictly conformed with the first decision of the primary Court dated 28/12/2016 ordering for return of the 1st respondent's properties by the 2nd respondent and not the appellant. Mr. Kitare added if anything TANRODS which destroyed the shed and other properties ought to have been joined as a party during execution proceedings.

On his side, the 2nd Respondent apart from noting that, he once unsuccessfully raised territorial jurisdictional issue of the trial court during the Appeal before the District Court of Kibaha, he supported the appeal. As to the 1st respondent in his response to the first ground argued that, appellant was sued in his own capacity and not as suburb chairperson, since he conspired with 2nd Respondent as stated at page 8 and 9 of the trial Court Judgment that, there is no any suburb meeting /authority which legalized the appellant to infringe the 1st Respondent's rights. Concerning the issue of joining TANROAD in execution order, 1st appellant was of the argument that, TANROAD was never been a part to the suit, and his properties were in the possession of the appellant and 2nd Respondent hence the duty of care was vested on them and not otherwise. With regard to the second ground of appeal, the 1st Respondent submitted that, the District Court of Kibaha considered whether there was illegality in the decision of Maili moja Primary Court, and satisfied itself of existence of none, hence reached to the conclusion that, the Primary Court correctly decided the matter in favour of 1st Respondent and against the appellant as well. In concluding, 1st respondent submitted that, appellant's act of not joining efforts with the 2nd respondent in pursuing all unsuccessful appeal attempts shows, he was

contented and thus in agreement with the decision of Maili Moja Primary Court. He thus prayed the Ruling of Kibaha District Court be upheld and the court order that, appellant and 2nd respondent jointly compensate him to the tune of Tsh. 6,804,000/- be upheld. In rejoinder, appellant reiterated his submission in chief and had nothing material to add.

I had time to study the record of the lower Court closely and dispassionately as well as taking into consideration both parties' submissions for and against this appeal. In addressing the grounds of appeal, I wish to start with the first ground where the appellant is challenging competence of the proceedings before the trial court for being sued in his own capacity instead of official capacity as suburb chairperson. And that TANRODS which allegedly destroyed the suit property and its annexures or other properties therein ought to have been joined by the 1st respondent as a party to the execution proceeding. I think the issue whether the appellant was improperly sued or not need not detain me much. As correctly submitted by the appellant himself that, the alleged complaint before the Maili Moja Primary Court was never recorded and determined on merit by the trial court. As such there is no proof that the same was raised as claimed apart from mere words from the appellant's counsel. For that matter I hold the District Court was justified

not to exercise its revisionary powers entertaining the issue which was never raised and determined before the trial court. In the case of **Farida and Another Vs. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (CAT Unreported), the Court of Appeal when deliberating on the similar issue held that:

> *"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and not raised at the lower court."*

Since in this matter there is no proof that the said issue of appellant being wrongly sued in personal capacity was raised and determined by the trial court, and basing on the stance of the above cited case, I see no reason to fault the District Court's decision for not considering and determining the said issue. I therefore dismiss the complaint. As to the argument by the appellant that the 1st respondent ought to have joined TANRODS in the execution proceeding as rightly submitted by the 1st appellant the submission which I embrace, TANRODS was not a party to the suit before the trial court therefore it would be improper to join her during execution proceedings. I also find no merit in this complaint and the entire first ground, thus dismiss it.

I now turn to the second ground concerning the allegation that, the Trial Court's order in its second decision dated 03/01/2020 for payment of compensation to the 1st respondent to the tune of Tshs. Tsh. 6,804,000/=, in lieu of the order for restoration of the wasted properties during road construction by TANROANS, was wrongly extended to the appellant contrary to the order of the same court in its first decision of 28/12/2016, I find the same to be baseless too. I so find as in Civil Case No. 87 of 2016, before the Maili Moja Primary Court, the 1st appellant sued both appellant and 2nd respondent, and the order issued by the said court on 28/12/2016 was directed to both appellant and 2nd respondent. For the purpose of clarity it is imperative that I quote the excerpt of the trial court judgment date 28/12/2016 at pages 8 and 9:

> *"... tofauti na maelezo aliyoyatoa, Baraza la Kitongoji na mdaiwa kutotoa hati yeyote ya makubaliano ya biashara ya pamoja na mdai unaonesha wazi mdaiwa wa kwanza alidanganya Serikali ya Kitongoji ili ajipatie mali zisizo za kwake na kupotosha Serikali ya Kitogoji kwa pamoja tunaona kipengele cha 1 na cha 3 vimethibitishwa na 2 na 4 siyo sahihi, hakuna amri yeyote uliyokuwa na nguvu kisheria ya kumkabidhi mdaiwa wa kwanza mali hizo, ushahidi wa mdai ni mzito ukilinganisha na ushahidi wa*

mdaiwa wa kwanza na mdaiwa wa pili, mdai ameshinda madai yake na gharama za shauri hili.

Mshauri wa 1 – Saini – Ally

Mshauri was 2 – Saini – Zologo.

Mhe. L. Pagula – Hakimu

28/12/2016.

Mahakama:

Banda la video na pool table na orodha ya mali iliyotolewa na mdaiwa wa pili ni mali ya mdai arudishiwe mdai mara moja na risiti za manunuzi mdaiwa alitumia jina lake baada ya kupewa fedha na familia ya mdai apewe mdai.

Mshauri wa 1 – Saini – Ally

Mshauri was 2 – Saini – Zologo.

Mhe. L. Pagula – Hakimu

28/12/2016."

From the above excerpt one will note that the order declaring the 1st respondent (plaintiff) as the successful party was made against both parties who were defendants (Appellant and 2nd Respondents) in the said suit. There is nothing from that part of the decision implying otherwise as if so the judgment could have clearly stated the case was not proved against the appellant which is not the case here. In as far as the District Court found there was no irregularities or incorrectness in the decision of the trial court which was the subject of the revision application before it and since there is

no misdirection in evaluation of the evidence before it or none compliance of the law noted by this court, I find the District court was right to conclude there was no any irregularity in the trial court's decision. I would have interfered with the District Court's decision had there been ground for so doing as stated in the case of **Credo Siwale Vs. The Republic**, Criminal Appeal No. 417 of 2013 when cited with approval the case of **Mbogo and Another Vs. Shah** (1968) EA 93, but there is none. In that case the Court said:

> *"(i) If the inferior Court misdirected itself; or*
>
> *(ii) It has acted on matters it should not have not have acted; or*
>
> *(iii) It has failed to take into consideration matters which it should have taken into consideration,*
>
> *And in so doing, arrived at wrong conclusion. Other jurisdictions have put it as "abuse of discretion" and that an abuse of discretion occurs when the decision in question was not based on fact, logic, and reason, but was arbitrary, unreasonable or unconscionable - See PINKSTAFF VS BLACK & DECKTZ (US) Inc, 211 S.W 361."*

The above stance was amplified in the case of **Japan International Cooperation Agency (JICA) Vs. Khaki Complex Ltd**, Civil Appeal No.

107 of 2004 (CAT-unreported) at page 8 when the Court of Appeal cited with approval the case of **Peters Vs. Sunday Post Ltd [1958] EA 424 when referring to the case of Watt Vs. Thomas** [1947] AC 484, where it was stated:

> *"It is strong thing for an appellate court to differ from the finding on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses.* ***An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this jurisdiction should be exercised with caution****." (Emphasis supplied)*

As alluded to in this matter, none of the grounds calling for interference of this court with the decision of the District court was advanced by the appellant. I therefore find the second ground lacking in merit and dismiss it. In the event and for the foregoing reasons and authorities cited, I hold all grounds of appeal are devoid of merits and hereby proceed to dismiss the Appeal on its entirety with costs.

It is so ordered.

DATED at Dar es salaam this 03rd day of December, 2021.

E. E. KAKOLAKI

JUDGE

03/12/2021

Judgment delivered at Dar es Salaam in chambers this 3rd December, 2021 in the presence of Mr. Respicius Mkandala, Advocate for the Appellant, both 1st and 2nd respondents in person and Ms. Asha Livanga, court clerk.

Right of appeal explained.

E. E. KAKOLAKI

JUDGE

03/12/2021