IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC. CIVIL APPEAL NO. 25 OF 2021

(Arising from Civil Appeal No 05 of 2021 at Geita District Court originating from Civil Case No. 126 of 2020 at Katoro Primary Court)

EMMANUEL MGAYA---------- APPELLANT

VERSUS

CHARLES BUSUMABU---------- RESPONDENT

JUDGMENT

Last Order: 12.05.2022
Judgment Date: 28.06.2022

M. MNYUKWA, J.

In this Appeal, the appellant Emmanuel Mgaya appealed against the decision of Geita District Court in Civil Appeal No. 05 of 2021 before Hon. Sosthenes, RM. Briefly, it goes that; the respondent (plaintiff in the trial court) instituted a case against the appellant (the 3rd respondent in the trial court) in Civil Case No 126 of 2020 of the Primary Court of Katoro at Geita, claiming a total of Tsh. 4,050,000/= as the sum advanced to the appellant and two others for the purchase of Gold-bearing sand residuals and costs which makes a total of Tsh. 4,800,000/=. The trial court decided

in favour of the respondent and ordered the appellant to refund the respondent Tshs. 4,000,000/=, or else to hand over the gold-bearing sand residuals to the respondent. Aggrieved, the appellant appealed before Geita District Court fronting two grounds of appeal against the judgment and order of the trial court. The appeal was determined, and the District Court of Geita dismissed the appeal for want of merit and uphold the judgment and orders of the trial court. The appellant did not see justice, he appeared in this court faulting both the decision of the trial court and the district court with two grounds of appeal: -

1. *That the resident magistrate court of Geita grossly misdirected itself in dismissing the appeal presented by the appellant and confirming the whole judgment of the trial court Katoro Primary Court without re-considering and proper re-evaluation of evidence adduced by the appellant at the trial court.*
2. *That the resident Magistrate of Geita erred in Law and in Fact for entering a judgment in favour of the respondent by invoking section 134 of the law of Contract while no implied or express terms were provided at the trial court that there existed an agent-principal relationship between the appellant and the respondent.*

At the hearing of the appeal which was conducted orally, the appellant Mr. Emanuel Mgaya appeared in person unrepresented while the respondent afforded the service of Mr. Julius Mushobozi learned counsel.

The appellant was the first to roll the ball and briefly, he prays to adopt his grounds of appeal as presented before the court insisting that the first appellate court failed to properly evaluate the evidence and therefore reached the wrong decision.

Responding to the appellant's submissions, Mr. Mushobozi learned counsel objected to the appellant's prayers and insisted that the appeal lacks merit and therefore be dismissed.

He prays to argue both grounds together. He avers that, at the trial court the respondent instituted a suit against the appellant and two others one, Bahati Manyanda and Faustine Stephano who were paid Tsh. 4,000,000/= in consideration of Gold-bearing sand residuals and on collection by the respondent in this appeal. The appellant stopped him claiming not to recognize the sale agreement. He went on that, at the trial court SU1 Bahati Manyanda testified that, he was employed by the appellant and he was as well instructed to sell the sand residuals. He refers to pages 11 and 12 of the trial court typed proceedings in which he insisted

that the appellant instructed his employees to sell the sand residuals to the respondent for the amount claimed.

He went on insisting that the evidence of the appellant at the trial court, admitted to have instructed the 1st and 2nd defendant to sell the sand residuals but he did not consent as to the price. In that regard, he insisted that there existed a principal-argent relationship. He went on referring this court to pages 9 and 10 of the trial court proceedings where SU1 who was a village chairman testified to have received a call from the appellant authorising him to proceed with the sale agreement of the sand residuals and once he testified to the trial court the appellant did not dispute. He, therefore, retires and prays this court to dismiss the appeal with costs and uphold the decision of the trial and the 1st appellate court.

In his rejoinder, the appellant insisted that the respondent's submission was wrong and went on to reiterate his submissions in chief.

After going through the submissions of the parties and the grounds of appeal, the only issue for determination and consideration is whether the appeal is meritious. In answering this issue, I will determine the grounds of appeal as presented by the appellant and argued by the respondent.

In the determination of this appeal on merit, and taking into consideration that this is the second appellate court, indeed, I am mindful with the settled principle that it is very rare for a second appellate court to interfere with concurrent findings of fact by two courts below unless there is a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice, (See **Helmina Nyoni v Yerena Magoti,** Civil Appeal No 61 of 2020 CAT at Tabora.)

Guided by the above principle I will evaluate the evidence of the lower courts based on the two grounds of appeal by the appellant. On the first ground of appeal, he claims that the 1st appellate court failed to re-evaluate the evidence adduced by the appellant at the trial court and on the second ground, he claims that the court erred invoking section 134 of the Law of Contract Act, Cap 345 R.E 2019 while no implied or express terms were provided at the trial court that there existed an agent-principal relationship between the appellant and the respondent.

Starting with the second ground of appeal, it is on records that the appellant was the owner of the Gold-bearing sand residuals and entered into an agreement to sell the same to the respondent through his employees who acted as his agent. The records are clear as evidenced on page 11 of the trial court's proceedings that one Bahati Manyanda testified

that, he was an employee of the appellant and sold the sand to the respondent in directives given by the appellant. Again, on page 12 of the trial court's proceedings, the appellant acknowledged that SU1 was his employee who instructed him to sell the said gold-bearing sand residuals, but did not agree with the price. It is on record that the 1st appellate court rightly evaluated the evidence of the trial court considered the evidence adduced and managed to rule out that there existed a principal-agent relationship between SU1 and SU2.

I proceed to find whether the agreement entered by the employees or agents in the course of their assigned duties binds the employer or masters. The general principle is that, the master can be liable for the omission or act done by the servant in the course of his employment. In the cases of **Machame Kaskazini Corporation Limited (Lambo Estate) v. Aikaeli Mbowe** [1984] TLR 70 cited with approval, the case of **Marsh v. Moores** (1949)2KB 208 at 215, in which the Court held:

> *"... It is well-settled law that the master is liable even for acts which he has not authorized provided they are so connected with the acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them."*

(See also **Registered Trustees of The Cashewnut Industry Development Fund and Cashewnut Board of Tanzania** Civil Appeal No. 18 Of 2001.

In this appeal at hand, the appellant's evidence at a trial court agrees that Bahati Manyanda was his employee and the appellant instructed him to sell the sand. Going to the evaluation of the two courts below, I find nothing to fault for it was rightly held that there existed a principal agent relationship between the appellant and Bahati Manyanda. It is on this point I see no merit in the 2nd ground of appeal.

On the first ground of appeal, it is the complaint of the appellant that, the 1st appellate court failed to re-consider and to properly re-evaluate the evidence adduced by the appellant at the trial court. I went to the courts' records and as it is a settled principle of law that, in civil cases the standard of proof is on the balance of probabilities. I proceed to hold that based on that principle, any party that wanted the court to rule in his favour must have given evidence which is greater to the evidence of other party as to the existence of such facts. Regulation 6 of the Magistrates Court (Rules of Evidence in Primary Courts) Regulations, 1964 GN. No 22 of 1964 provides that: -

"In civil cases, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favour, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other."

The records reveal clearly that the respondent managed to exhibit the trial court with evidence as to the existence of the claim and the trial court rightly acted upon the evidence according to the law. Again the 1st appellate court rightly evaluated the evidence and gave its verdict.

Based on my findings above, I find nothing to fault in the findings of the two courts below. In the upshot, I proceed to uphold the decision of both, the trial court and the 1st appellate court and this appeal is hereby dismissed with costs.

It is so ordered.

Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

28/06/2022

Court: Judgment delivered in the presence of the appellant and in absence of the respondent.

M.MNYUKWA

JUDGE

28/06/2022