

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

PC. CIVIL APPEAL No. 26 OF 2021

(Arising from PC Civil Appeal No 21 of 2021 of District Court of Musoma, Original PC Civil Case No 7 of 2021 PC Kiagata)

KIKUNDI CHA TWIMANYE APPELLANT

VERSUS

JUMA MWITA BWANA RESPONDENT

JUDGMENT

9th and 30th March, 2022

F. H. MAHIMBALI, J.:

Originally the respondent had guaranteed one Christopher James Mwita for a loan of 1,000,000/= advanced to him by the appellant. The said loan advanced ought to have been repaid with an interest of 200,000/=. Thus total sum to be repaid was supposed to be 1,200,000/=. The said Christopher James Mwita only paid 500,000/= leaving an outstanding sum of 700,000/=. Having defaulted, the appellant is alleged to have attached some households belonging to the respondent (guarantor) and sold them for purposes of repaying the said sum 700,000/=. It was astonishing to the respondent to have learnt that

the appellant had also gone to the said Christopher James Mwita and claimed the whole sum to the appellant and got paid. This then prompted him to file the suit at the Primary Court where it was ruled that the claims by the respondent were not established, however advised the parties to sit and discuss their matter before the WEO.

This decision didn't amuse the respondent, who successfully challenged it by way of appeal at the District Court. In essence the District Court ruled that there was double payment to the appellant and thus ordered that the said households taken from him, be returned forthwith. Aggrieved by that decision, the appellant has knocked the doors of this Court armed with a total of five grounds of appeal namely:

- 1. That, the 1st appellate forum erred on point of law to preside over and determine a matter on which it lacked jurisdiction.*
- 2. That since the appellant is not a legally identified body under the law, the 1st appellate forum erred in law to proceed with a matter on which there was no legal party i.e (the then plaintiff) according to law.*
- 3. That the appellate court on 1st appeal misdirected itself on points of fact to find that;*
 - a) The respondent herein had paid a balance due and owing to the appellant while not.*

b) That the respondent herein had no obligation to pay any balance to the appellant since one Christopher James Mwita had paid up his debt while not.

4. That since there was notice that the appellant had engaged services of an advocate, the appellate District court erred on point of law to deny the appellant a right to legal representation.

5. That being duty bound to re-evaluate the evidence and analyse it analytically, the 1st appellate forum misdirected itself on points of facts and thus misapprehended and failed to scrutinize the evidence, thus causing a failure of justice on point of the appellant.

The hearing of this appeal was done by way of written submissions. Whereas Mr. Makowe acted for the appellant, the respondent fended for himself.

In his written submissions in support of the appeal, on the first ground of appeal, Mr. Makowe submitted that in terms of section 18(1) of the MCA, the trial court lacked jurisdiction to handle the matter it being not a claim on customary law or contractual but a debt claim. He thus invited this Court to use its revisionary powers to quash the proceedings and set aside all orders of the lower courts as was decided out of jurisdiction.

On the second ground, he argued whether the appellant is a legal

body capable of being sued or suing. As the law only recognizes two persons: natural and legal persons, he wondered if the appellant is a corporate body capable of suing or being sued for that matter. He invited this Court to have a look on section 4 of Cap 1 and give appropriate directives. Otherwise, he is of the firm view that, the appellant was improperly sued at the trial court.

On the third ground of appeal which is on assessment of the evidence in record by the respondent, he submitted that the position reached by the first appellate court that what was claimed from Christopher James Mwita was paid by him is unjustified as the said Christopher James Mwita did not testify at the trial court to ascertain the fact of payment as alleged. As to this fact, he is of the view that the findings by the trial court was justified.

On the fourth ground of appeal, he submitted that the appellant was denied his right of legal representation. He submitted that on the 8/6/2021, the first appellate court was informed that the appellant preferred the legal services of an advocate and that proposals were made how the counsel would manage to enter appearance. Strangely, the matter was re-assigned to another magistrate where then the matter proceeded with the hearing. He strongly faulted the proceedings

on denial of the appellant's legal right of representation which is constitutionally guaranteed. He urged this Court to fault the first appellate court's proceedings on that denial of a right to legal representation.

The respondent on the other hand resisted the appeal. On the first ground, he submitted that considering the nature of this dispute, the trial Primary court had legal mandate to adjudicate the matter pursuant to section 18 (1) of the MCA as rightly done. He urged this Court to fault the appellant's submission as misleading.

In reply to the second ground of appeal, he submitted that the said property was confiscated by the appellant prior to the filing of the suit by the respondent at Kiagata Primary Court. The suit therefore is the resultant of the measures taken by the appellant. It could not therefore be pursued as objection proceedings as submitted by the learned counsel.

On the competence of the appellant being sued at the trial court, it has been submitted that it is properly sued as the said organization dully registered in the District Authority upon which the group is situated. By being registered, it has locus standi as it acquired the status of suing or being sued.

On the fourth ground of appeal, he submitted that the first appellate court was justified in evaluating the evidence and arrived at a proper conclusion that the said debt had been discharged.

On the last ground in respect of right to legal representation, he refuted by submitting that there is no evidence to substantiate the said allegation as submitted.

Having dispassionately heard the parties' submission, it is now important to determine whether this appeal is merited as argued.

The first ground of appeal concerns the powers of primary court over the said decided suit, whether it had jurisdiction to determine it. Mr. Makowe is of the view that the claims being not based in customary or Islamic nature, then the primary court was not justified to determine it for want of jurisdiction. The respondent has countered it arguing that as per section 18(1) of the MCA, the trial court had jurisdiction to determine it. Of course, I am aware that the issue of court's jurisdiction is of paramount consideration. It can be raised by the party at any time of the case. See the case of **Sospeter Kahindi vs Mbeshi Mashini**, Civil Appeal No 56 of 2017 (CAT – unreported). For purposes of better understanding, the relevant provision of the law (MCA) is hereby revisited to bring the point home:

18.-(1) A primary court shall have and exercise jurisdiction

(a) in all proceedings of a civil nature-

(i) Where the law applicable is customary law or Islamic law:

Provided that no primary court shall have jurisdiction in any proceedings of a civil nature relating to land;

*(ii) For **the recovery of civil debts, rent or interests** due to the Republic, any district, city, municipal or town council or township authority under any judgment, written law (unless jurisdiction therein is expressly conferred on a court or courts other than a primary court), right of occupancy, lease, sublease or contract, if the value of the subject matter of the suit does not exceed fifty million shillings, and in any proceedings by way of counter-claim and set-off therein of the same nature and not exceeding such value;*

*(iii) **for the recovery of any civil debt arising out of contract, if the value of the subject matter of the suit does not exceed thirty million shillings**, and in any proceeding by way of counterclaim and set-off therein of the same nature not exceeding such value; [Emphasis added].*

My understanding to this provision, the primary court in civil suits has three situations in exercising its jurisdiction. One is where the law

applicable is customary or Islamic law. Secondly, on recovery of normal civil debts. Thirdly, recovery of civil debts arising out of contract. In the latter two situations i.e recovery of normal civil debts, rent or interests or recovery of debts arising out of contract, the issue of Islamic or customary law does not arise. That said, the primary court in this matter was justified to handle the said suit though not based in Islamic or customary law, for it being a claim arising out of contract it has jurisdiction to determine it in terms of Section 18(1) (a) iii of the MCA.

Whether the appellant was properly sued at the trial court. It is the submission by Mr. Makowe learned advocate that, the appellant being not a registered body, it had no legal personality to be sued for that matter or sue. Whereas Mr. Makowe urges this Court to direct properly on that, the respondent submitted that the same is dully registered at the District Authority, thus capable of being sued as rightly done. According to law, (Section 4 of the Law of Limitation Act, Cap 1) "a person" is defined as:

*"Means any word or expression descriptive of a **person** and includes a public body, company, or **association** or body of persons, **corporate or unincorporated**". [Emphasis added].*

That means, legally speaking a person can either be a normal person, legal body, corporate or unincorporated. In this meaning, Kikundi Cha Twimanye was properly sued in law. However, there must be a line of difference on the manner the unincorporated body or group of persons is further handled legally from the corporate body in the extent of liability. Should it be taken that the said Kikundi Cha Twimanye has no legal liability, then it is interesting that the same has hired Mr. Makowe and is in Court representing the same. This is equal saying that "one cannot have a cake and claim it." This ground equally fails in my considered view.

On the third ground, the issue is on assessment of the prosecution's evidence. According to the evidence of SU1 and SU2 it is undisputed that the respondent's households were confiscated for purposes of settling the debt owed to Christopher James Mwita as guaranteed by the respondent. The main issue that is decisive of the case, is whether the said Christopher James Mwita had already discharged the said debt as alleged by the respondent (guarantor). There is no clear evidence on this. The evidence in record establishes the respondent alleging that the appellant had already been paid by the said Christopher James Mwita. In absence of his testimony, it is hard to

accord it any weight. It is merely hearsay evidence. With this, I concur with the trial magistrate that the evidence is wanting for the respondent to claim the said refund on allegation that the appellant is double paid by himself and Christopher James Mwita.

On the issue of abrogation of the right to legal representation to the appellant by the appellate court, in my perusal to the first appellate court record, I have neither encountered the notice to legal representation nor any single appearance of any advocate in respect of the said appeal. The argument by Mr. Makowe though bitterly argued, is unsupported. The first appellate court's record is neat, clear and self-explanatory against Mr. Makowe's submission on that.

In totality of the appeal, it is allowed with costs on the basis that the first appellate court, misapprehended the facts and evidence of the case and wrongly arrived at that decision. The same is faulted and set aside. The decision of the trial court is hereby restored.

It is so ordered.



DATED at MUSOMA this 30th day of March, 2022.


F. H. Mahimbali

JUDGE

Court: Judgment delivered 30th day of March, 2022 in the presence of Mr. Marwa for the appellant, respondent present in person and Mr. Gidion Mugo, RMA.

Right to appeal is explained.



F. H. Mahimbali

JUDGE

30/3/2022