IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

PC CIVIL APPEAL NO. 33 OF 2019

(Arising from the decision of District Court of Kondoa in Civil Appeal No. 4 of 2019, Original Civil Case No. 1 of 2019 Busi Primary Court)

MUSTAPHA RAMADHANI .....APPELLANT
VERSUS

ABUU SUKA ..... 1ST RESPONDENT
BAKARI ALLY NDEE ..... 2ND RESPONDENT

JUDGMENT

31/03/2022 & 13/6/2022

KAGOMBA, J

This is a second appeal by MUSTAPHA RAMADHANI (the appellant) who lost his first appeal in the District Court of Kondoa at Kondoa (the 1st appellate Court) against ABUU SUKA (1st Respondent) and BAKARI ALLY NDEE (2nd respondent) vide Civil Appeal No. 4 of 2019. The first appeal originated from Civil Case No. 1 of 2019 filed by ABUU HAMISI SUKA against the appellant at Busi Primary Court (the trial Court) where the appellant lost.

Having been aggrieved by the decision of the 1st appellate Court, this appeal has been preferred by the based on four grounds as follows;

1. That, 1st appellate Court erred in law and fact in deciding that the Civil Case No. 1 of 2018 and Civil Case No. 1 of 2018 is not *res judicata* while they involve the same Court, same parties and subject matter

and that the decision in Civil case No. 1 of 2018 has not been challenged.

2. That, the 1st appellate Court erred in law and fact in holding that the 1st respondent has not been paid while the trial Court's decision in Civil Case No. 1 of 2018 at page 4 and 5 prove that 1st respondent has already been paid Tsh. 7,000,000/= and further it was proved through receipts No. 106 dated 07/01/2018 issued by 2nd respondent which was admitted as exhibit "A".
3. That, the 1st appellate Court erred in deciding that the 1st respondent has not been paid his claim while through the receipts No. 107 dated 07/10/2018 issued by the 2nd respondent admitted as Exhibit "A", the 2nd respondent being the Secretary of Kariati Matrekta Company acknowledged to have received sum of Tsh. 7,000,000/= from the appellant being the deposit for purchase of a new tractor and right after the decision in Civil Case No. 1 of 2018 through the receipt No. 109 dated 10/12/2018 issued by the 2nd respondent the appellant paid the remaining sum of Tsh. 4,610,000/= thus making total of Tsh. 11,610,000/=.
4. That, the 1st appellate Court erred in law and fact in not considering the proceedings of the trial Court and exhibits which prove that the 1st respondents' claims were already settled.

To contextualize this appeal, the following background of this matter needs to be told. The appellant and the 1st respondent, jointly bought a tractor from M/s Kariati Matrekta Company at a consideration of Tsh. 22,000,000/= in 2015. In 2017 their joint operation of the said tractor faced serous misunderstanding as the appellant withheld the same out of reach of

the 1st respondent. Wisdom prevailed, whereby a reconciliatory meeting held on 07/01/2018 and that was attended by both parties plus 12 other people resolved that the 1st respondent should be refunded by the appellant his contribution to the purchase price of the tractor, amounting to Tsh. 11,610,000/=. Exhibit "A" tendered before trial Court in Civil case No. 1 of 2018 purports to document "the Agreement" reached. The said exhibit A shows that the appellant paid Tsh. 7,000,000/= on the same day of the agreement and that he was to pay Tsh. 2,000,000/= on 10/01/2018 and Tsh. 2,600,000/= on 10/02/2018. This said "Agreement" in Exhibit "A" was signed by the appellant witnessed by Abushekhe Zuedi as well as the 2nd respondent witnessed by one Halifa S. Haruna.

On 21/6/2018, the 1st respondent filed the Civil Case No. 01 of 2018 at the trial Court claiming, from the appellant, the debt of Tsh. 5,310,00/= arising from the joint tractor business. It is further stated that as per agreement the appellant should refund 1st respondent's money but he has failed to do so. After a full trial, the trial Court found that among other things, the 1st respondent had partially proved his claim of Tsh. 5,310,000/= and was entitled to payment of Tsh. 4610,000. Thus the trial Court entered judgment in favour of the 1st respondent accordingly.

Records shows that on 8/04/2019 the 1st respondent approached the trial Court for execution whereby on 11/04/2019, the trial Court having observed that the appellant was summoned to appear before the Court but did not despite receiving the summons, ordered execution form to be issued. On 17/02/2020 the appellant having been asked to show cause why the properties attached should not be sold, he objected to the execution because

he had filed an appeal. The Court found that there has been no appeal against Civil Case No. 01 of 2018 but there is an appeal against Civil Case No. 01 of 2019. Hence the trial Court ordered execution to proceed.

In another development, on 03/01/2019 the 1st respondent approached the trial Court again where he filed Civil Case No. 01 of 2019. This time he claimed for payment of a debt of Tsh. 7,700,000/= against the appellant as the 1st defendant and Bakari A. Ndee the 2nd respondent herein, as the 2nd defendant.

In the second case, the 1st respondent's narrated how the said tractor was jointly purchased and operated up to when their partnership took a negative twist. He said that, following misunderstanding between them, it was agreed that the appellant shall refund him the money he contributed the for purchase of the tractor so that the tractor would remain as a sole property of the appellant. He said however that the appellant had failed to pay him as agreed, yet the appellant kept the tractor. Under such circumstances, the 1st respondent claimed to be paid Tsh. 7,7000,00 as unpaid amount.

Again, after another full trial by the same trial Court presided by the same Magistrate, a judgment was entered for the 1st respondent. However, the trial Court found that the unpaid amount which the 1st respondent was entitled to receive is Tsh. 7,000,000/= and not Tsh. 7,700,000/=. The trial Court reached this decision after its observation that the appellant, instead of refunding that amount to the 1st respondent, paid the money to a third party, one Samila. The trial Court found the 2nd respondent blameless.

Upon appeal by the appellant, the 1st appellate Court did not find any fault in what the trial Court did, hence proceeded to uphold the decision in Civil Case No. 1 of 2019. It is that decision of the 1st appellate Court which has prompted this second appeal.

During hearing of the appeal, Mr. Samweli Mcharo, learned advocate appeared for the appellant while the 1st respondent fended for himself. As the 2nd respondent was found blameless by the trial Court,he showed no interest in the appeal and never entered appearance despite being served. Hence the appeal was heard ex-parte against him.

Submitting on the first ground of appeal, Mr. Mcharo argued that both Civil Case No. 1 of 2018 and No. 1 of 2019 originated from the same transaction involving the tractor. He argued that in Civil Case No. 1 of 2018 the trial Court found that the appellant had already paid the 1st respondent Ths. 7,000,000/= hence the outstanding debt was Tsh. 4,610,000/=. Surprisingly, the same Court entertained Civil Case No. 1 of 2019 where the 1st respondent claimed payment of tsh. 7,700,00/= while the case is on the same subject matter, which is a tractor, the matter that had already been decided upon by the same Court, presided by the same Magistrate.

Mr. Mcharo added that the trial Court ordered the appellant to pay Tsh. 7,000,000/= while it had already ordered him to pay an outstanding amount of Tsh. 4,610,000/=, a decision which had not been departed from nor appealed against. He therefore argued that the Civil Case No. 1 of 2019 was *res judicata* and the Court itself was *ex functus*. He cited the provision of rule 11 of the Magistrate Court (Civil Procedure in Primary Court) Rules, GN

No. 119 of 1983, as well as the cases of **Umoja Garage V. NBC Holding cooperation (2003) TLR 339**, and **Kamunye and others Vs. The Pioneer General Assurance Society Ltd (1971) EA 263** to the effect that a case already decided in a Court of competent jurisdiction between the same parties shall not be determined by any other Court as there should be finality to litigation.

Mr. Mcharo faulted the decision of the 1st appellate Court to endorse the trial Court's decision by basing merely on the fact that the amount claimed in the two civil cases before the trial Court were different. He emphasized that despite of the difference in the amount claimed by the 1st respondent, the subject matter was the same. It was about the tractor, hence the second case was *res judicata*.

On the second ground of appeal, Mr. Mcharo submitted that the 1st appellate Court erred in holding that the 1st respondent had not been paid (Tsh. 7,000,000/=) while in Civil case No. 1 of 2018 before the trial Court, it was clear that he was paid. He added that all the witnesses called by the 1st appellant testified that he was paid and that exhibit "A" also proved that payment was done.

With regard to the third ground of appeal, Mr. Mcharo submitted that the 1st appellate Court erred to hold that the 1st respondent was yet to be paid Tsh. 4,610,000/= while in Civil Case No. 1 of 2019 the appellant presented exhibits to show he paid the decretal amount of Tsh. 4,610,000/=. He mentioned those exhibits as receipt No. 109 dated 10/12/2018 and acknowledgement by 2nd respondent, that he received the said money as the

secretary of the reconciliatory meeting. Mr. Mcharo added that the money was paid to the 2nd respondent because it was resolved that the money be paid at the meeting.

In connection to the above submission, Mr. Mcharo submitted that the 1st respondent filed execution proceedings where by the cows and calves of the appellant worth Tsh. 12,000,000/= were forcefully auctioned despite the appellant paying Tsh. 4,610,000/=. He argued that the execution was not properly done, hence prayed this Court to invoke its revisionary jurisdiction to quash that execution for being done while the appeal was *sub judice*. He also prayed this Court to order refund of the value of the cows cautioned.

On the fourth and last ground of appeal, Mr. Mcharo submitted that all the claims by the 1st respondent were already paid as per proceedings and judgment of Civil case No. 1 of 2019. He argued that both lower Courts erred by not considering that the dispute between the parties was already closed before the filing of Civil Case No. 1 of 2019, and that the trial Court was *ex functus*.

Having submitted as above, Mr. Mcharo prayed the Court to allow the appeal, quash the decisions of the lower Courts and invoke its revisionary powers to order refund to the appellant and to make revision the legality of Civil Case No. 1 of 2019.

Mr. Abuu Suka, the 1st respondent being a lay person did not address the issues of *res judicata* raised in the first ground of appeal.

On the second ground of appeal, Mr. Suka categorically denied to be paid Tsh. 7,000,000/=, a reason he decided to go to Court for redress.

Mr. Suka elaborated that while his total claim was Tsh. 12,000,000/= and the appellant has told the Court that he gave Tsh. 7,000,000/= to the 2nd respondent for purpose of paid the said claim, the said money was not given to him by the 2nd respondent.

With regard to the payment of Tsh. 4,610,000/= as argued by Mr. Mcharo in the third ground of appeal, Mr. Suka submitted that the said amount was ordered to be paid by the trial Court, the reason he filed execution proceedings. He submitted however, that following the auction of the appellant's cows, he was given by the Court only Tsh. 3,000,000/=. He said that the other proceeds of sale were paid to the auctioneer and to the person who kept the animals as their costs. He added that the costs increased because of the delay that ensued following the objection filed by the appellant. He emphatically denied that the appellant had paid Tsh. 4,610,000/= to the meeting secretary as alleged. The 1st respondent therefore denied all the allegations of him being paid by the appellant, save for Tsh. 3,000,000/= paid to him by the trial Court following the said execution of judgment in Court Civil Case No. 1 of 2018.

Likewise, the 1st respondent denied the appellant's submission in the fourth ground of appeal, save for the said Tsh. 3,000,000/= which he was paid by the trial Court.

In his rejoinder, Mr. Mcharo maintained his submission in Chief and his assertion that auctioning of the cows and calves was illegally done while there was a pending appeal in Court. He prayed the Court to invoke the provision of section 30(1) (b) (ii) of the Magistrates' Courts Act, [Cap 11 R.E 2019] for its revisionary powers as earlier submitted.

Having heard the rival submissions of both parties who appeared before the Court and after thoroughly perusing the proceedings and judgment of the lower Courts, I am of the view that the following are issues worth my determination;

1. Wether the Civil Case No. 1 of 2019 filed in the trial Court was *res judicata* following determination of Civil Case No. 1 2018 by the trial Court
2. Whether the 1st appellate Court erred to confirm the decision of the trial Court in Civil case No. 1 of 2019.
3. Whether the auction of appellant's cows in execution of trial Court judgment was marred by illegality.

Since is this the second appeal, this Court has a defined scope to zoom. There exists a concurrent finding of both lower courts that the appellant is liable to pay the 1st respondent the sum of Tsh. 7,000,000/= as a refund of his money which stand as an outstanding debt todate. This Court may only interfere with such a concurrent finding if the lower courts failed to appreciate the right position of the law or wrongly interpreted the evidence adduced (see the case of **Jamali Ally @ Salum V. The Republic,** Criminal Appeal No. 52 of 2017, Court of Appeal of Tanzania at Mtwara)

On the first issue the appellant argues that the Civil Case No. 1 of 2019 ought not to be entertained by the trial Court. His reason is that the same parties were before the same Court over the same subject matter originating from the joint tractor business, and the Court which was competent to determine the case did determine it conclusively. It is true that to certain extent, Civil Case No 1 of 2018 would look like the same with Civil Case No. 1 of 2019 under the circumstances, it is imperative to closely examine the concept of resjudicata. The principles governing the legal concept of *res judicata* have been well explained in a number of Courts decisions. Normally four to five criteria are considered in determining whether a matter is resjudicata.

Firstly , if the parties are the same, secondly, if the issue for determination or the subject matter directly and substantially the same; three if the case was already determined to its finality by a competent Court. (See **Tom Amiri Salimu V. Feroz Salehe Mohamed [1978) LRT**. In his submission on this issue Mr. Mcharo was emphatic on the point that the case was filed against the same persons, the appellant together with the 2nd respondent but was about the same subject matter, which is the tractor and was already decided by the same Court presided by the same Magistrate. Mr. Mcharo downplayed the fact that the amounts claimed in the subsequent case was different.

In **Mulla's Code of Civil procedure,** Butterworths, 16th edition it is stated on page 173 that; it is not every matter decided in a former suit that

can be pleaded as *res judicata* in a subsequent suit. He says that to constitute *res judicata,* those conditions as stated above "must concur".

It therefore follows that the conditions known to make a subsequent case *res judicata* must all exist. It is not a question of either or, but all conditions without exception must exist.

The 1st appellant Court, in rejecting the appeal, among other things considered the provision of Rule 11 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN No. 119 of 1983 which exceptionally allows a Court to try "other issues, if any involved in the proceedings". The 1st appellate Court also considered the holding of this Court by Hon. Chipeta, J in **Tom Amiri Salimu V. Feroz Salehe Mohamed [1978] LRT** where it was stated:

> *"In deciding whether a suit is res judicata the Court must consider whether in an earlier case the matter was directly and substantially in issue between the same parties and finally determined by a competent Court".*

Having considered the above, the 1st appellate Court correctly found that the claim in Civil Case No. 1 of 2018 of Tsh. 5,310,000/= is different from the claim of Tsh. 7,700,000/= in Civil Case No. 1 of 2019 and that the same are not substantially the same as required to be in the case of **Tom Amiri Salimu** (Supra).

The first appellate Court again correctly applied the decision in the case of **Village Chairman – K. C. U Mateka V. Anthony Hyera [1988] TLR**

188 where it was decided that for the plea of *res judicata* parties in the previous suit must be the same as in the subsequent suit. In the Civil Case No. 1 of 2019, which is the subsequent suit, the respondent sued the appellant together with the 2nd respondent. The facts of the case reveal why the 2nd respondent was sued. He is the one who was the secretary of the reconciliatory meeting who also issued receipt to acknowledge the payment made by the appellant which the 1st respondent had repeatedly denied to receive it. The amount in dispute in the second case is Tsh. 7,700,000/= which was decided by the trial Court in the previous suit.

The proposition that a matter is directly and substantially the same was considered in the Indian Case of **Isher Singh V. Sarwan Singh, AIR 1965 SC 948** and in **Mohd S. Labbai V. Mohd Hanifa, AIR 1965 SC 1569** where it was observed.

> *"Whether a matter was directly and substantially in issue in a former suit is to be determined by a reference to the plaint, the written statement, the issue and the judgment".*

In the two cases under consideration, i.e Civil Case No. 1 of 2018 and Civil Case No. 1 of 2019 the only conditions that are the same are the background of the case and the Court (including the Magistrate) which determined the case. Otherwise, the parties are different, the claims as shown in claim form J/PFC 52 are different and so are the issues and judgment thereof. While in Civil Case No. 1 of 2018 the trial Court found the appellant liable to pay Tsh. 5,310,000/= as was claimed, the same trial Court found the appellant liable to pay the 1st respondent Tsh. 7,000,000/= and not Tsh. 7,700,000/= that was claimed by the 1st respondent.

For the above reasons, I concur with the decision of the 1st appellate Court with regard to the first issue. This determination does not only conform to the exclusions available under the principle of resjudicata but also conform to the quest for substantive justice to the 1st respondent, who was to be refunded Tsh. 11,600,000/= following the appellant's holding of the tractor jointly bought for business. Justice would cry if the 1st respondent would not be compensated accordingly. Both lower Courts found that the moneys paid by the appellant to the 2nd respondent did not reach the 1st appellant. Under the circumstances, of this case the 1st respondent should not be blamed for what happened because he did not authorize payment by instalments nor did he sign to receive the money from the appellant or the 2nd respondent, save for what he was paid after execution proceedings of the Civil Case No. 1 of 2018. For all these reasons, the first issue is answered in the negative.

Regarding the second issue as to whether the 1st appellate Court erred to confirm the decision of the trial Court in Civil Case No. 1 of 2019, I have to once again refer to the submission in this Court by Mr. Mcharo, the learned advocate for the appellant. In his submission Mr. Mcharo apart from raising the plea or *res judicata* he faulted the decision of the 1st appellant Court on the following grounds;

One, in holding that the 1st respondent had not been paid Tsh. 7,000,000/= while in Civil Case No. 1 of 2018 it was clear he was paid.

Two, in holding that the 1st respondent was yet to be paid Tsh. 4,610,000/= while in Civil Case No. 1 of 2019 the appellant presented exhibited that he paid the decretal sum of Tsh. 4,610,000/=. In this connection, Mr. Mcharo referred to receipt No. 109 dated 10/12/2018 and the testimony of 2nd respondent who acknowledged receipt of the said money from the appellant, and;

Three; for not considering the proceedings and judgment in Civil Case No. 1 of 2019 which showed that all the claims of the 1st respondent were already paid and thus the dispute between the parties had already been closed.

I have carefully read the records of the lower Court with regard to the alleged faults. Again, as correctly found by the 1st appellate Court, none of the payments routed through Kariati Matrekta Company reached the 1st respondent despite the 2nd respondent issuing receipts acknowledging the payments. For justice to be substantively rendered to the 1st respondent, who according to the record, was blameless, the money was to paid to him personally. There is nowhere in record, not even in exhibit "A", the 1st respondent agreed to be paid by installments, let alone to have his money taken by M/s Kariati Matarekta Company for supplying him another tractor.

From the said Exhibit "A", one finds that the agreement to allow the appellant pay the 1st respondent's money by instalment was originally between the appellant and M/s Kariati Matrekta Company. Two things were vividly inserted in the said agreement, which were not there originally. These are 1) The name of the 1st appellant and 2) the words "*leo tarehe 07/01/2018*

Amelipa Tsh. 7,000,000/=" to mean that the appellant has paid a down instalment of Tsh. 7,000,0000/= on 07/01/2018. This document which is handwritten in Swahili, was not signed by the 1st respondent. The documents signed by the appellant and the 2nd respondent witnessed by Abu Shekhe Zuedi and Halifa S. Haruni.

In the minutes the of meeting held on 07/01/2018, the 1st respondent is on record to have signed the attendance but did not endorse the payments to be done by installments. What was agreed by the 1st respondent was to be paid his money back. In the trial Court proceedings, he repeatedly testified that he rejected the proposal to be paid by instalments. That being said, this Court finds that the 1st respondent should have been paid back his money himself. As he did not authorize the payment to be made through the 2nd respondent, it can not be said that he was paid the amount of Tsh. 7,000,000/= or Tsh. 4,610,000/=. Exhibit "A" is not a proof that the 1st respondent was so paid. The appellant, under the circumstances, may have a recourse for claiming back the money allegedly paid, against those who received it from him, a recourse which the 1st respondent lacks.

For the above, reason all the faults raised by the learned advocate for the appellant obviously lack legal basis. The right of the 1st respondent to be repaid his money cannot be extinguished by receipts produced by a third party to acknowledge receipt of money for or on behalf of the 1st respondent without his endorsement. Consequently, the second issue is also answered in the negative.

Finally, the learned advocate raised the issue of illegality of the auction done in execution of the judgment of the trial Court in Civil Case No. 1 of 2018 where appellant's cows and calves worth Ths. 12,000,000/= were forcefully auctioned despite the fact that there was a pending appeal. I feel restrained to address this matter at this stage. The complaint is a new ground and which was never raised in the 1st appeal to the District Court.

As a matter of general principle, this second appellate Court cannot allow matters not taken or pleaded in the lower Courts to be raised on appeal. (See **Gandy v. Gaspar Air charters Ltd (1956) 23 EACA 139 and James Funke Gwagilo V. Attorney General (CAT) Civil Appeal No. 67 of 2001 (unreported)**). In this appeal, the issue of illegality of the auction has not featured anywhere in the four grounds of appeal filed in this Court. For this reason, I disregard the submission made by the learned advocate for being improperly introduced at this stage.

Having so determined all the three issued, I find no merit in this appeal and the same is dismissed with costs.

Ordered accordingly.

Dated at Dodoma this 13th day of June, 2022.

THE HIGH COURT TANZANIA

ABDI S. KAGOMBA
JUDGE