

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CIVIL APPEAL NO.7 OF 2022

(Arising from Civil Appeal Case No. 4 of 2021 of Handeni District Court and originating from Civil Case No. 10 of 2019 of Kabuku Primary Court)

MUSSA ATHUMANI.....APPELLANT

-VERSUS-

NEIL MGUHI.....RESPONDENT

JUDGMENT

Date of Last Order: 30/06/2022
Date of Ruling: 06/07/2022

AGATHO, J.:

The Appellant and Respondent entered into a house construction contract on 24/04/2019. Whereas the Respondent contracted the Appellant to construct a 27 roomed house for a price of TSH. 10,000,000/= . It was agreed that the payment will be way of installment. It was further agreed that the construction will be completed within four months from the start of the construction project.

The Respondent made payments to the Appellants in installment. In each installment receipts (papers in an exercise book) were signed by both parties to confirm payments were issued. The Respondent lost some of the

receipts but later he found them. Having found the receipts, the Respondent discovered he has overpaid the Appellant over and above the agreed contractual sum of TSH. 10,000,000/=. The amount he overpaid the Appellant was alleged to be TSH. 3,690,000/=. It is also a fact that the Respondent hired other contractors Gumbo to repair the toilets and a well and Sembogo (to fix the doors).

The Respondent thereafter filed a suit at Kabuku Primary Court claiming the repayment of the exceeded amount to the tune of TSH. 3690,000/=. The trial court was satisfied that the Respondent proved his case on the balance of probability. It awarded the Respondent TSH. 2,045,000/=. The Appellant was dissatisfied by that decision he Appealed to Handeni District Court. At the first appellate court the Appellant cited the following grounds of Appeal:

- (1) That the trial Magistrate erred in law and fact by deciding in favour of the Respondent.
- (2) That the trial Magistrate erred in both law and fact by failure to consider watertight evidence adduced by the Appellant.
- (3) That the trial Magistrate erred both in law and fact by deciding the matter in favour of the Respondent while he failed to prove on the standard required.

The District Court having heard the parties on their submissions and examined the trial court proceedings and evidence on record it dismissed the appeal and upheld the trial Court's decision. The Appellant was further aggrieved hence this appeal. The Appellant has marshalled two grounds to that effect:

- (1) That the Appellate Magistrate erred in law and fact to uphold the decision of the Primary Court in favour for the Respondent on a weak evidence and the Respondent failed to prove his case on the required standard in both Primary Court and first Appellate Court,
- (2) That the Appellate Court erred in law and fact by failure to re-evaluate and analyze properly the evidence adduced by the parties.

The appeal was agreed to be disposed by way of written submissions. And the parties filed their written submissions timely. To resolve the present appeal there two main issues to be determined:

- (1) Whether the Appellate Court Magistrate erred in law and fact to uphold the decision of the Primary Court in favour fo the Respondent on a weak evidence and the Respondent failed to prove his case on the required standard in both Primary Court and first Appellate Court; and

- (2) Whether the Appellate Court Magistrate erred in law and fact by failure to re-evaluate and analyze properly the evidence adduced by the parties.

Both the above grounds of appeal are anchored on the issue evidence. Standard of proof and re-evaluation of evidence on record. They will be disposed them jointly.

From the outset and before I begin examination of the grounds on appeal and submissions thereto, I should say something regarding the issue of forgery which the Appellant raised in his submission. This issue is neither found in the petition nor was it discussed in the lower courts. Being a new ground of appeal that was not raised in the petition of appeal, I decline to examine it. I thus concur with the Respondent that this ground of appeal is alien to the present appeal. At the best it is an afterthought.

The records show that the contract of house construction price is TSH. 10,000,000/=. The Respondent claimed that during effecting payments to the Appellant he paid him in excess TSH. 3,690,000/= that he sought at the Primary Court to be paid back by the Appellant. The Primary Court was satisfied that the Respondent paid in excess TSH. 2,045,000/=. That was confirmed by the District Court. The first Appellate Court held inter alia that Appellant failed to prove that he was not paid in excess. The Respondent

on the other hand satisfied the Court by his documentary evidence. That is the receipts that were tendered in the Primary Court and admitted as exhibit P.1. They had signatures of both the Appellant and the Respondent. Those receipts showed that the Appellant was paid the amount in excess. Hence the Primary Court and District Court were convinced that the Respondent proved his claim as per Section 110 of the Evidence Act [Cap 6 R.E. 2019]. According to them the Respondent managed to discharge his burden of proof on the balance of probability as per Section 3(2)(a) of the Evidence Act [Cap 6 R.E. 2019].

In the present appeal the gist of the case is on the overpayment of the price for house construction. The agreed amount was TSH. 10,000,000/=. But as the work was on going the Respondent alleged to have realized that he has overpaid the Appellant TSH. 3,690,000/=.

The Respondent's witnesses (SM2 and SM3) did not testify on the content of the contract. They seemed to be unaware of the construction price. On page 6 of the trial court proceedings (SM3) was involved to do some work (to make the doors) for the same house. The SM3 admitted on the same page that he does not know the terms agreed upon by the parties. SM4 on his part he did not testify on the terms of the contract. Nor did he say anything regarding construction price.

It is also clear from the testimony of SM2 and SM3 that the Respondent engaged other persons including SM3 to do some works on the side (building site) for example to make doors etc. Thus, the testimony of SM2 and SM3 could not corroborate the Respondent's testimony regarding TSH. 3,690,000/= exceeding the house construction price.

Turning to the grounds of appeal, the two grounds are disposed jointly as they both relate to a question of evidence, that the District Court confirmed the decision of the trial court basing on the weak evidence of the Respondent.

We examine what evidence was the base of the trial court decision? At the trial Court photocopy of receipts (loose papers) signed by the Appellant and the Respondent as evidence of payments done by the Appellant to the Respondent were tendered and admitted in evidence as Exhibit P1 collectively. These receipts were tendered to show that the Appellant was paid in excess of the price agreed in the contract.

Perhaps a critical question is whether it was proper to receive secondary evidence (photocopy) of receipts without inquiring the whereabouts of the original? The Appellant queried the admission of secondary evidence while the conditions for receiving such evidence were not met. This finds no response from the the Respondent's submission. The Appellant submitted

that the receipts were the exercise book/ledger book in which they were signing all payments. Surprisingly, the trial court admitted photocopies of the receipts that were loose papers. Though they were signed by both parties there was no explanation as to where the original receipts are. The law under Section 67(1) of the Evidence Act [Cap 6 R.E. 2019] provides for conditions under which secondary documentary evidence may be admitted including where the original is lost or destroyed or is in the possession of adverse party, etc. Similarly, regarding documentary evidence Rule 11 of the Primary Court Evidence Rules, GN No. 66 of 1972 provides that:

"Documentary evidence

(1) The original document must always be produced.

Exceptions:

(a)

A copy of the original document may be proved if the original has been lost or

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destroyed or if it is in the hands of the opposing party and he will not produce it,

but (unless paragraph (b) of this exception applies) oral evidence must be

given that it is a true copy of the original;

(b)

a copy of a court or official document may be proved if it contains a certificate,

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signed by a registrar, magistrate or the official who has the original document, that it is a true copy.

(2) Where documentary evidence is produced, oral evidence must be given to connect it with the case."

From the above provision of the law the trial court and the first appellate Court exhibited non-direction or misdirection on the admission of secondary evidence that triggered interference by this Court. Looking at page 4 of the trial court proceedings there is nothing mentioned as to why the Respondent tendered photocopy of the receipts instead of the original ones. On page 2 of the trial Court judgment the trial magistrate did not explain whether the receipts admitted as exhibit P.1 were original or photocopy. I have examined the said exhibit; they are indeed photocopies. It is secondary evidence that should not be admitted without the conditions set in the law being fulfilled. The Respondent was the custodian of the receipts he should have explained where the original receipts are. It is not clear why he did not tender the exercise book containing the receipts. It is also not stated in the trial court proceedings whether the Respondent brought the original receipts and the Court examined them and the Appellant was given an opportunity to scrutinize them.

On perusal of the District Court judgment (especially page 7) it is apparent that the Court did not consider the nature of exhibit P.1 admitted at the

trial court. Being a secondary evidence, the Court should have admitted it under the condition set under Rule 11 of the Primary Court Evidence Rules.

The Respondent claimed he lost the receipts but later he found them. and when he found them, he realized that he has overpaid the Appellant (see pages 5 and 7 of the District Court Judgement). It is unclear whether they were photocopies or original.

In law the best evidence is direct oral testimony (section 62 of the Evidence Act [Cap 6 R.E. 2019]), and in case documentary evidence then it is the document itself (that is original document). The secondary documentary evidence may be admitted

Despite that existence of house construction contract was never disputed by the parties. That means it was a valid contract as per Section 10 of the Law of Contract Act [Cap 345 R.E 2019]. The only controversy being the Respondent's demand for repayment of the money paid in excess to the Appellant.

It is unclear on the record whether the Appellant did finish the construction or not. But the Respondent engaged Mr. Gumbo to repair the toilets and the Respondent paid him some money for the work that was supposed to be done by the Appellant. It is not clear why the Respondent did not ask the Appellant to finish the job instead of engaging other persons.

This being a second appellate court is barred from interfering with concurrent findings of the lower courts unless there is mis-direction or non-direction of evidence leading to miscarriage of justice (see **Richard Otieno@Gullo v R, Criminal Appeal No. 367 of 2018 at page 17**).

However, as stated herein above there was a misdirection in the admission of secondary documentary evidence without observing the conditions set out by the law.

Standard of proof in civil cases is on the balance of probability (see Section 3(2)(a) of the Evidence Act [Cap 6 R.E. 2019]). Under Rule 6 of the Magistrates' Courts (the Rules of Evidence in Primary Court) Regulations of 1972, G.N. No. 66 of 1972 it provides that civil cases decisions are based on weight of evidence. The heavier the evidence one has the higher the possibility of him winning the case [See **Hemed Said v Mohamed Mbilu[1984] TLR113**].

In the end, I find this appeal to have merits due to the irregularity or misdirection stated hereinabove in admitting secondary evidence. I allow the appeal and then proceed to reverse the decisions of both the District Court and Primary Courts. As the context of this case dictates each party shall bear its own costs.

It is so ordered.

DATED at TANGA this 6th Day of July 2022.



U. J. Agatho
U. J. AGATHO
JUDGE
06/07/2022

Date: 06/07/2022

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Present

B/C: Zayumba

Court: Ruling delivered on this 6th day of July, 2022 in the presence of Appellant and the Respondent.

U. J. Agatho

U. J. AGATHO
JUDGE
06/07/2022

Court: Right of Appeal is available as per the law.



U. J. Agatho
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JUDGE
06/07/2022