IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

(PC) CIVIL APPEAL NO. 15 OF 2021

(Arising from Civil Appeal No. 62 of 2020 of Muleba District Court and Original from Civil Case No. 136 of 2020 of Muleba Urban Primary Court)

JOYCE LAWI MASEMBEJO..... APPELLANT

VERSUS

JULIUS RENATUS.....RESPONDENT

JUDGMENT

08/03/2022 & 05/05/2022

NGIGWANA, J.

The appellant Joyce Lawi Masembejo being aggrieved by the decision of the District Court of Muleba in Civil Appeal No. 62 of 2020 delivered on 10th day of May, 2021 appeals to this court on the following grounds:-

1. *That the learned Senior Magistrate erred in law and fact for faulting the trial court decision on the same reason that exhibit P1 which was deemed to be tendered by SM4 was not read over to the court while in real sense exhibit D1 which was tendered by SM4 was read over and when the respondent asked by the trial court if he had an objection over the said exhibit P1, he replied, he had no objection and the respondent signed for satisfaction over such exhibit.*

2. *That the learned Senior Resident Magistrate erred in law and fact for basing her decision over the purported exhibit P1.*

3. *That the learned Senior Resident Magistrate erred in law and fact for faulting the trial court decision on the reason that the appellant evidence was strong as compared to that of the Respondent.*

4. *That the learned Senior Resident Magistrate erred in law and fact for not considering that the appellant proved her case on the required standard. (balance of probability).*

5. *That the learned Senior Resident Magistrate erred in law and fact by deciding the case against the weight of evidence.*

Wherefore, the appellant prays this honourable court to allow this appeal with costs, quash and set aside the decision of Muleba District Court and upheld the trial court decision.

The respondent filed the reply to petition of appeal contesting all the grounds of appeal raised.

The brief facts giving rise to this appeal as can be gathered from the trial court and 1st appellate court records are as follows; the appellant filed a suit in the Primary Court Muleba Urban against the respondent claiming the sum of Tshs. 1,321,500/= as compensation of her crops to wit; maize, sweet potatoes and sweet paper alleged to have damaged by the respondent's cattle. After a full trial, the trial court was satisfied that the appellant had proved the case to the place of probability, therefore the matter ended in favour of the appellant, whereas the respondent was ordered to compensate the appellant at a tune of Tshs. 1,321,500/= being the value of the destructed crops.

Aggrieved by the decision of the trial court, the respondent successfully appealed to the District Court of Muleba, where the decision of the trial court and orders thereto were quashed and set aside on the ground that the case had not been proved to the balance of probabilities.

Aggrieved by the decision of the trial court, the appellant has now come to this court armed with five (5) grounds of appeal. (See the fore page of this judgment).

At the hearing of this matter, the appellant was represented by Mr. Ibrahim Mswadiku, learned advocate while the respondent was represented by Mr. Joseph Bitakwate. The matter was disposed by way of written submissions. Arguing the appeal, the learned advocate for the appellant consolidated ground No. 1 and 2 and argued them together, also ground 3, 4 and 5 and were argued together.

Arguing the 1st and 2nd grounds, Mswadiku submitted that in the trial court the valuation report was admitted as exhibit D1, thus the exhibit which was expunged by the 1st appellate court had never been part of the trial court record. He further submitted that exhibit D1 was tendered by SM4 and objection raised, thus the same is still part of the trial court record.

In reply, Mr. Bitakwate submitted that exhibit D1 was not read over in court after being admitted, thus it was correctly expunged from the record. However the learned counsel escaped to argue whether exhibit D1 was real expunged from the record or otherwise.

The 1st and 2nd grounds should not detain me. The trial court record is very clear to the effect that the valuation report was tendered by SM4 and it was admitted and **marked exhibit D1**. Let the record speak for itself.

"Shahidi (SM4) – naomba tathimini hii ipokelewe kama kielelezo changu
***Sahihi ya Shahidi**: Alinod Roman.*
***Mahakama**: Mahakama hii inapokea tathimini hiyo baada ya kuwa hakuna aliyepinga, kiimepokelewa kama D1.*
***Washauri**: 1. Amelia.*
2. Burchard.

A.K. Rugaibula, RM
25/09/2020."

***Mdai**: Sina nyongeza.*
***Amri**: Shauri hili limeahirishwa hadi tarehe 30/09/2020 Mdaiwa afike na shahidi wake kwa ajili ya kusikilizwa."*

The 1st appellate court expunged exhibit P1 from the record on the ground that it was not read after being admitted. Indeed I shake hands with Mr. Mswadiku that what was expunged was non-existing exhibit because the valuation report was admitted and marked exhibit D1.

However, the procedure governing admission of documents in the court of law is very clear that the document has to be identified, cleared and admitted and after it has been admitted, its contents must be read out to the parties. There is no doubt that the valuation report was admitted and marked exhibit D1, but the same was not read out to the parties. In other words, its contents were therefore not made aware to the parties, and that is a serious

irregularity. The respondent was not even afforded an opportunity to cross-examine the appellant on that exhibit. The same is therefore liable to be expunged from the record as I hereby do. Since the contents of exhibit D1 were not read to the parties in court the same is hereby expunged from the court record.

As regard the 3rd, 4th 5th grounds of appeal, Mr. Mswadiku submitted that the standard of proof in civil cases is on the balance of probabilities. That this standard was stipulated under rule 6 of 1972. The learned counsel also referred me to the case of **Hemed said versus Moyhamed Mbilu** [1984] TLR 113 where it was held that in civil cases two parties cannot tie but the party whose evidence is heavier than that of the other is the one who must win the case. That in this case, even if the valuation report is expunged, the evidence of the Appellant still remain strong to support the claim.

In reply, Mr. Bitakwate submitted that while the appellant alleged that the cattle that were alleged to have destroyed crops in the appellant's farm were the respondent's cattle, there is no evidence produced by the appellant's side to prove that the alleged cattle belonged to the respondent. That the evidence of appellant's side was full of contradictions; the appellant alleged that the crops were destroyed on 20/07/2020, SM2 alleged that the crops were destroyed on 27/07/2020, the other two witnesses testified that the crops were destroyed on 25/07/2020 and 26/07/2020 respectively. That the decision of the District court was very proper.

It is apparent that the complaint of the appellant as per 3rd, 4th and 5th grounds of appeal is that the case was proved to the required standard as

stated by the trial court thus the 1st appellate court erred in law and fact when failed to uphold the decision of the trial court.

It is common knowledge that the standard of proof in civil cases is on the balance of probabilities; and that he who alleges must prove. In the Primary Court, the plaint (**Hati ya mdai**) was coached as follows;

"Namdai Mdaiwa fidia ya mazao ya Tshs. 1,321,500/= zinazotokana na mifugo ya mdai kuharibu mazao yangu mnamo tarehe 25/07/2020. Hayo ndiyo madai yangu.
Sahihi ya Mdai (Amesaini)
Nathibitisha kwamba hyo niliyoeleza hapo juu ni ni kweli kwa kadri nijuavyo.
Sahihi ya Mdai: (Amesaini)."

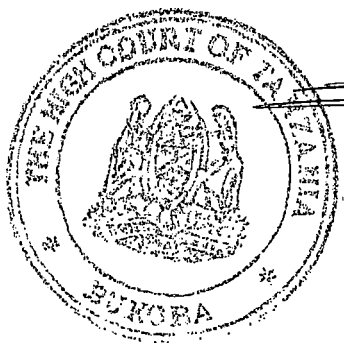
The appellant therefore had the duty to prove that on **25/07/2020**, the respondent's cattle destroyed her crops valued at Tshs. 1,321,000/=.

The evidence available in the trial court record is that, the appellant told the trial court that her crops were destroyed on **20/07/2020**. As per plaint there was no destruction which occurred on 20/07/2020. No evidence given by Appellant that she witnessed the cattle of the respondent destroying her crops. The evidence given by her as to whether the cattle belonged to the respondent was hearsay evidence since she was not the eye witness of the incident. SM1 Joshua Manyire told the court that the incident took place on 25/07/2020. SM2 Damasen Alhaniel told the trial court that he was called by SM1 on 26/07/2020 and he saw 2 cows within the mark J.R.B into the appellant's farm and eventually, were handed over to the respondent's

herdsman but no handing over note tendered in court on that effect. SM3 Yamaha Mahendeke told the trial court that the incident took place on 25/07/2020 and the two cows which entered and destroyed the crops of the appellant were handed over to the respondent's herdsman. SM4 valuated the destroyed crops and then prepared the valuation report. The respondent denied the claims. His herdsman Alfan Ismal denied the allegations and told the trial court that the respondent's cows have neither entered into the appellant's farm nor destroyed crops therein. He added that the respondents cows had the make TZMR141.

Indeed, there is evidence that the crops of the appellant were destroyed by head of cattle, but no sufficient evidence to prove that the alleged head of cattle belonged to the respondent. The evidence given by the appellant does not support the plaint in terms of the date in which the head of cattle entered the appellant's farm and damaged crops therein.

The above said, I find nothing to fault the decision of the first appellate court. I therefore hold that the instant appeal lacks merit. Consequently, the same is hereby dismissed. Given to the nature of the case, each party shall bear its own costs.

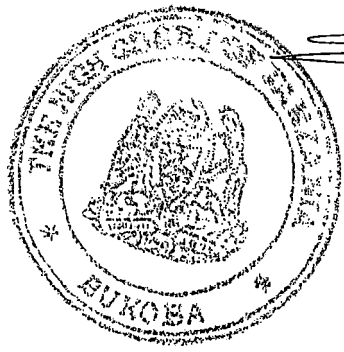


E.L. NGIGWANA

JUDGE

05/05/2022

Judgment delivered this 5th day of May, 2022 in the presence of both parties in person, Mr. E. M. Kamaleki, Judges' Law assistant and Ms. Tumaini Hamidu, B/C.



E.L. NGIGWANA

JUDGE

05/05/2022