

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 98 OF 2019

**THE REGISTERED TRUSTEES
OF THE EVANGELISTIC ASSEMBLIES OF GOD
TZ (EAGT)APPELLANT**

Vs

DANIEL MTINGE.....RESPONDENT

Date of Last Order: 02/06/2022

Date of Judgement: 12/07/2022

J U D G M E N T

MGONYA, J.

The Appellant being aggrieved by the decision in **Civil Case No. 68 of 2012** has filed **three (3) grounds** of appeal for determination by this Court.

- 1. That, the trial District Court erred in law for entertaining the suit that was time barred;***
- 2. That, the trial District Court erred in law and fact by awarding the Respondent claims that was never legally proved;***
- 3. That, the trial District Court erred in law and facts by shifting the duty of proof to the Appellant who was the Defendant at the trial;***

Having gone through the submissions of the parties arguing for and against the appeal, I have no intentions to reproduce the same but consider all submissions filed in arguing this appeal.

Firstly, to begin with the **first ground** of appeal that **the Court erred in determining a matter that was time barred**. The Appellant states to have raised a preliminary objection in the Counter Affidavit and the Court still proceeded with hearing of the matter. In reply the Respondent stated that the said objection was heard by the trial Court and overruled by the Ruling stating within it the reasons as to why the matter was found not to be time barred.

Having perused the lower records before me, I observed the objection that is stated to have been raised and by going through the proceedings; I find the same was heard and a ruling was delivered with respect thereto and the same was overruled. The decision in respect of the objection was never appealed against hence showing that the Appellant herein was not aggrieved by that decision. Therefore, stating that the matter was entertained by the Trial Court while being time barred is an afterthought and the same stands no chance to hold water before this Court at this stage. It is the Court's practise that once an objection is raised the same to be heard and determined before hearing the substantive matter that the

objection is raised in. I find the Appellant trying to mislead this appellate Court from this ground. **It is from the observation in the Court's records that this ground of appeal is dismissed for lack of merits.**

With regards to the **second ground** of appeal, **the appellant avers that the trial Court erred in law and fact by awarding the Respondent claims that was never legally proved.** In their submission the Appellant's claim that the claims of the Respondent that is **Tshs. 6,000,000/=** that the Respondent lend to the church were never proved by the Respondent but yet still the Court ordered the said money be paid back to the Respondent.

The Respondent countered the Appellant's contention by submitting that the said claims were proved since there were two witnesses whose testimonies collaborated in respect to the **Tshs. 6,000,000/=** that was borrowed to the Church and never paid back despite countless promises to do so.

It is my firm view that in civil matters the standard of proof is on balance of probabilities. The testimony of the Respondent on the claims of **Tshs. 6,000,000/=** was supported by two witnesses who were Church Elders and their testimony was not contradictory. From the position of being Church Elders I find that PW 2 and PW 3 were in a best position to know the affairs of the church unlike the Appellant's

witnesses. It should also be considered that the time when the money was given was when the church elders were leaders. The Appellant's witnesses in their testimony testified on denying to have knowledge of the said amount claimed at the same in **2011** when they joined the Church. It is likely that they were not aware of matters of **2009** that the church elders admitted the Respondent to have lend money to the Appellant. Having the testimony of PW2 and PW 3 collaborating each other and not being distracted by the Defendant I find the said witnesses' testimony having weight. **It is then that I am of the same position as the trial Court that the claims were proved through oral evidence. This ground too fails.**

Determining the **third ground** of appeal, where the Appellants states that, **the trial District Court erred in law and facts by shifting the duty of proof to the Appellant who was the Defendant at the trial.** It was the Appellant's submission that the Court was not correct in wanting the latter to prove the claims that were claimed by the Respondent hence it is the principle of law that he who alleges must prove. Therefore, the duty to prove the claims on the musical instruments was on the Respondent and not otherwise as he ought to have had receipts to prove he bought them.

Indeed, it the requirement of the **Evidence Act Cap. 6 R. E. 2019 under section 110 (1) and (2)**, that proof of facts that are established to exist have to be proved by the person who states such a fact exists. From the records of the Trial Court the Respondent established to have bought musical instruments and given them to the Church to use and the same were being in possession of church. This fact was testified upon by the Witnesses of the Respondent. The records show that the two witnesses who were church elders were in knowledge of the said instruments and that they were owned by the Respondent and he had given them to the church to use. The Appellants failure in countering this fact and the Court ruling in favour of the Respondent should not be interpreted that the Court shifted the burden of proof to the Appellant side. I am of the firm view that the Court reached such decision basing on the testimony of the Plaintiff side (Respondent herein). **It is from the above that I find this ground of appeal lacks merits and misconceived.**

Having said all of the above, **I find the three grounds of appeal before this Court lack merits. The decision of the trial Court is hereby upheld and this appeal is hereby dismissed with costs.**

It is so ordered.

Right of appeal is explained.

L. E. MGONYA

JUDGE

12/07/2022

Court:

Judgement delivered before Honourable **J. Luambano Deputy Registrar** in the presence of Mr. Alphonse Katemi Advocate for the Appellant, Respondent in person and Mr. Richard RMA on this 12th day of July, 2022.

L. E. MGONYA

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Having perused the lower records before me, I observed the objection that is stated to have been raised and by going through the proceedings; I find the same was heard and a ruling was delivered with respect thereto and the same was overruled. The decision in respect of the objection was never appealed against hence showing that the Appellant herein was not aggrieved by that decision. Therefore, stating that the matter was entertained by the Trial Court while being time barred is an afterthought and the same stands no chance to hold water before this Court at this stage. It is the Court's practise that once an objection is raised the same to be heard and determined before hearing the substantive matter that the

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