IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 54 OF 2021

(Arising from Civil Appeal No. 6 of 2020 from Ilemela District Court, originated from Civil Case No. 91/2020 from Ilemela Primary Court)

CLEMENT PETRO BULASHI---------- APPELLANT

VERSUS

WINSTON VENANT CLEMENT ---------- RESPONDENT

JUDGMENT

Last Order: 10.08.2022
Judgement Date: 15.09.2022

M. MNYUKWA, J.

The respondent herein Winston Venant Clement, instituted a civil case No. 91/2020 before Ilemela Primary Court, against the appellant Clement Petro Bulashi claiming Tshs. 1,000,000/= that was paid to the appellant for the payment of 250 kg of Nile perch fish to be supplied within a week in which the appellant neither delivered the same nor did he return the amount paid.

When the appellant entered an appearance before a trial court, and the claim was read before him, he responded by saying;-

> *"mheshimiwa Hakimu madai yako sawa ananidai Tsh. 1,000,000/= alizonikabidhi. Isipokuwa Samaki hazikuwa kwa kilo.*
>
> **Maelezo ya Mdaiwa:**
>
> *Siku hiyo ya tarehe 5/2/2020 nilienda kwake kupiga hesabu nilikuwa namdai Tsh. 1,600,000/=."*

The trial court entered the reply by the appellant as an admission to the claim and entered judgement for the respondent and further advised the appellant to file a separate suit for the claim raised by him if he wishes so.

The trial court's decision aggrieved the appellant and he appealed against trial court's decision to the District Court of Ilemela vide a Civil Appeal No. 6 of 2020, which was tabled before Hon. Sumari Resident Magistrate, raising three grounds of appeal which are:

1. *That the trial court erred both in law and facts when it rushed to come with a conclusion that the appellant has admitted the whole of the respondent's claim.*
2. *That the trial court erred both in law and facts for not opening a room for the appellant herein above to prosecute his counter claim against the respondent.*

3. *That, the trial court erred in law and in facts to condemn the appellant unheard.*

The appellant prayed for his appeal to be allowed by quashing and setting aside the trial court proceeding and judgement of Ilemela Primary Court in Civil Case No. 91/2020, an order for the matter to be tried denovo before another magistrate, and any other relief to the discretion of the court.

In determining the appeal before it, the first appellate court, dismissed the appeal on the ground that, there was no denials on part of the appellant as he was given a right to defend himself and he admitted to the claim. The first appellate court also held that, it is a practice of the law and on the discretion of the court upon reason, to order a separate suit by the defendant against the plaintiff and therefore the appellant's admission of the claim was done in line with the right to be heard.

The first appellate court's decision also aggrieved the appellant and he now appeals to this court with three grounds of appeal as reproduced hereunder;

1. *That the appellate Court erred both in law and facts by dismissing ground of appeal and concluded that the appellant has admitted the whole of the respondent's claim.*
2. *That the appellate court erred both in law and facts when it upheld the decision of the trial Court that the appellant should have filed a separate suit on counterclaim while the*

same was direct connected to the respondent's contractual claim against him.

3. *That the appellate Court erred both in law and facts to hold that the proceedings before trial court were properly conducted and principles of fair trial were met.*

The appellant prays for his appeal to be allowed by quashing and setting aside the proceedings and judgement of both the first appellate Court and the trial Court, an order for the trial to be heard denovo, costs of the suit, and any other order fit to be granted.

During the hearing of this appeal, the appellant was represented by Yuda Kavughushi, learned counsel and the appeal was heard exparte against the respondent as he did not enter appearance despite the knowledge of the existing of appeal against him. The appeal was argued orally.

In his submissions, the appellant's counsel started by adopting the grounds of appeal to be part of his submission. He also prayed to argue jointly the 2nd and 3rd grounds of appeal and to argue the 1st ground separately.

On the 1st ground of appeal, the learned counsel submitted that, the trial court and first appellate court erred in law and fact to conclude that the appellant has admitted the claim of Tshs. 1,000,000/=. He avers that,

the law is clear that, for any person who admits the claim, the court has to rely on or give its decision on the admission. It was the appellant learned counsel's submission that the appellant did not admit because his statement was ambiguous. He further asserts that, upon going through page 3 of the trial court's proceedings, the reply of the appellant shows that the appellant did not admit the claim as there was a counterclaim on it.

He went on to submitting that, on page 1 of the trial court's judgement, the appellant stated that there was an agreement entered on 05/02/2020 between him and the respondent on fish business in which the consignment of fish was supposed to be delivered to the respondent and that, the judgement of the trial court does not reflect what has been stated by the respondent.

It is counsel's submission that, since the claim are interrelated which arose in the same transaction and the appellant owed the respondent Tshs. 1,600,000/=, that the two debts were not supposed to be separated as it was a defence in that cause. The appellant's counsel cited the case of **Chibinza Kanwa vs Amos Kibusa & Another** [1990] TLR 36, to insist his submission that if the counterclaim is not related it can be

claimed in another suit, which was not the case in our case at hand in which the claims are related.

The Appellant's counsel further cited section 18 (a)(iii) of the Magistrate Court's Act, Cap. 11 R.E 2019 to show the jurisdiction of the primary court to hear civil cases and counterclaim or set-off. He also invokes Rule 44 of the *Primary Court Civil Procedure Rules GN No. 310 of 1994*, and state that the Rule requires that, the court should analyse which facts are disputed and which facts are undisputed. He holds the view that, the court erred in law and fact as there was counterclaim and so the court denied the respondent's right to defend his case.

On the 2nd and 3rd grounds of appeal, it is the appellant's learned counsel submission that, the principle of fair trial goes together with the right to be heard. That, since the court entered a plea of admission, it did not give right to the appellant to defend his suit, which is his right as per the law. The Appellant's counsel cited the cases of **Hussein Kambai vs Kodi Ralph Siyara,** Civil Revision No. 25 of 2014 CAT at Arusha and **James Andrew @ Mwenge v R**, Criminal Appeal No. 44 of 2017 CAT at Mwanza, insisting on right to be heard.

Relating to our instant case, it is the appellant's learned counsel's submission that, the appellant was not given an opportunity to defend his

counterclaim and therefore denied him his right to defend his case. He settled his submission praying this court to quash and set aside the decision of the two lower courts below and the matter be heard afresh before another magistrate.

In determining this instant appeal, the question for determination is whether the appeal is merited.

I am aware that, this is the second appeal in which the two courts below had concurrent findings. As the principle of law requires, I am bound not to disturb the concurrent findings of the two lower courts unless I am warranted to do so, if there is a misapprehension of evidence, violation of principles of laws or procedure, or the findings has occasioned miscarriage of justice. This principle was also enlightened in the case of **North Mara Gold Mining Limited vs Emmanuel Mwita Magesa**, Civil Appeal No. 271 of 2019 CAT at Mwanza, in which the Court of Appeal cited with authority the case of **Neli Manase Foya vs Damian Mlinga** [2005] TLR 167 had this to say;

> *".. it has often been stated that a second appellate court should be reluctant to interfere with a finding of fact by a trial court, more so where a first appellate court has concurred with such a finding of fact. The District Court, which was the first appellate, concurred with the findings of*

facts by the Primary Court. So, did the High Court itself, which considered and evaluated the evidence before it and was satisfied that there was evidence before it and was satisfied that there was evidence upon which both the lower courts could make concurrent findings of the fact."

The above case laws will guide me in abiding to the principle of law stated above in the determination of this appeal.

The two lower court records, grounds of appeal and the Appellant's submissions show that, the findings of the 1st appellate court confirmed the findings of the trial court that, the appellant admitted to the claim of Tshs. 1,000,000/= as he responded to the claim read over to him by the trial court's magistrate. The appellant's counsel asserts that, the findings of the two lower courts were in error. On the 1st ground of appeal, it is the counsel's submission that, the appellant did not admit to the claim as his statement was ambiguous as it had counterclaim on it. As reproduced above, the nearest English translation of the statement can be said to be;

"Your honourable magistrate the claim is proper I owe him Tshs. 1,000,000/= that he gave me. However, the fishes were not in kilograms.
Defendant's statement.
On that day that is on 5/2/2020 I went to him and we did calculation and he owed me Tshs. 1,600,000/=."

From this statement, I agree with the appellant's counsel that the statement could not mean a clear admission of the claim by the respondent. It is my view that, the appellant first disputed the consignment of fishes to be in kilograms despite the fact that he agreed that the respondent claimed Tshs. 1,000,000/= against him, he raised a concern that after the calculation he found out that he claimed Tshs. 1,600,000/= against the respondent. The trial magistrate was supposed to analyse the statement to know if the statement was an admission without any ambiguity in it.

As rightly invoked by the appellant's counsel, Rule 44 of the *Primary Court Civil Procedure Rules GN No. 310 of 1994* provides that;

> ***Rule 44. Admission and denials.***
> *At the first hearing of a proceeding, the court shall ascertain from each party whether he admits or denies the allegations made against him by the other party and shall record all admissions and denials and shall decide and record what matters are in issue.*

From this provision, the trial court was supposed to ascertain from the appellant's statement whether he admitted the claim against him. I am not disputing that, the appellant firstly admitted that the respondent was claiming Tshs. 1,000,000/=, however, the appellant's statement went further to substantiate that, after the calculation, the respondent owed

him Tshs. 1,600,000/= in which it is my understanding that, after that response, the appellant denied the same.

To my understanding, the first appellant's statement was showing that he had knowledge that the respondent claimed Tshs. 1,000,000/= but he raised a defence that the calculation showed that he was also claiming Tshs. 1,600,000/=. Taking into consideration that the claim raised was from the same transaction then the admission was rebutted by the claim raised by the respondent.

The appellant's counsel submitted that, the appellant's statement raised a counterclaim against the respondent. The law governing civil procedure in Primary Court has no specific provision that carters for the counterclaim compared to the Civil Procedure Code Cap. 33 R. E 2022. However, the meaning of counterclaim can be found in works of literature which among of them is the book of Takwani, C. K, (1963) Civil Procedure, with Limitation (7th Edition) Published by Eastern Book Company, as provided on page 270, in which counterclaim is defined as a

"claim made by the defendant in a suit against the plaintiff".

It is further elaborated that;

"it is a claim independent of, and separable from, the plaintiff's claim which can be enforced by a cross- action. It

is a cause of action in favour of the defendant against the plaintiff."

Looking at the definition as provided above and the explanation that follows, I do not agree that the appellant's statement amounted to the counterclaim per-se. The reason being that, the appellant's claim of Tshs. 1,600,000/= was discovered after the calculation that was made as the appellant's statement referred. That is to say, the amount claimed by the appellant was from the same transaction in the business of fish as the respondent responded that, they gave the claimed amount to the appellant as the loan so that he can supply fishes to him.

And, therefore, the appellant's statement was a defence over the respondent's claim and not a cross-action per se. From these findings then, the magistrate was supposed to hold a full trial to know whether the defence pleaded by the appellant was proper after a full hearing and presentation of evidence before him. I take the appellant's statement to be rather a set-off and not a counterclaim. The reason being that, a set-off is one of the defence available to the defendant when a defendant raises a claim to offsets the original claim.

C.K Takwani, elaborates better on the concept of set-off on page 265 of his book *Civil Procedure, with Limitation,* (1963) 7th Edition, Published by Eastern Book Company, as he says, set-off is extinction of

debts of which two persons are reciprocally debtors to one another by the credits of which they are reciprocally creditors to one another. From the appellant's statement then, the appellant was pleading a defence against the respondent's claim, and therefore we can not hold the same to be an admission required under Rule 44. And therefore, the trial magistrate was supposed to give an opportunity to the parties to present their evidence for the court to substantiate the claims before it.

The first appellate court also erred to hold that the appellant's statement amounted to admission and that the appellant did not dispute the claimed amount. As explained above, the appellant only admitted to acknowledge the respondent's claim and went on to raise a defence of set-off as analysed earlier. And therefore, both the trial court and first appellate court erred to hold that there was an admission by the appellant. From this finding, the first ground of appeal is hereby allowed.

Moving to the second and third grounds of appeal, from the findings of the first ground of appeal, it is clear that, the appellant was not given the right to be heard to substantiate his claims as pleaded. The right to be heard is a fundamental right in which if violated, vitiates the whole proceeding of the court. This was held in the case of **Kumbwandumi**

Ndemfoo Ndossi vs Mtei Bus Services Limited, Civil Application No. 27/02 of 2016.

I join hands with the appellant's submission that a fair trial goes together with the right to be heard whereas the appellant was not afforded with. This means that there was no fair trial on the part of the appellant which violates the principles of natural justice. In brief the principles of natural justice require for a fair trial for each part to be given a right to be heard.

The importance of observing principles of natural justice were enlighten in the case of **Arcopar (O.M) S.A vs Herbert Marwa and Family Investments Co. Ltd & 3 Others**, Civil Application No. 94 of 2013, in which the court held that where natural justice is violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at, in absence of the departure from the essential principles of natural justice and therefore the decision reached without regard to the principles of natural justice which are also enshrined in our Constitution is null and void.

Therefore, I agree with the appellant's counsel that the appellant was not given a right to be heard which violates the principles of natural justice, and in result, the procedural irregularity vitiates the whole

proceedings. In fine, the second and third grounds of appeal have merit. Therefore, this appeal is hereby allowed in its entirety. I further order the file to be remitted back to the trial court and the matter to be tried afresh before another magistrate. No order as to costs.

It is so ordered.

M. MNYUKWA
JUDGE
15/09/2022

Right of appeal fully explained to the parties.

M. MNYUKWA
JUDGE
15/09/2022

Court: Judgment delivered this 15th September, 2022 in the presence of the appellant's counsel.

M. MNYUKWA
JUDGE
15/9/2022