

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.402 OF 2021

(Originating from Civil Case No. 21 of 2020 in the District Court of Ilala at Kinyerezi)

USHIRIKA WA WAFANYABIASHARA

WA MIFUGO NA MAZAO YAKE VINGUNGUTI

(UWAMIVI)..... APPELLANT

VERSUS

ANNA PETER LEMBILE.....1ST RESPONDENT

UNYANGALA AUCTION MART LIMITED.....2ND RESPONDENT

JUDGMENT

Date of Last Order: 29/09/2022

Date of Judgment: 05/10/22

Kamana, J:

In the District Court of Ilala, the Appellant Ushirika wa Wafanyabiashara wa Mifugo na Mazao Yake Vingunguti (UWAMIVI) unsuccessful sued Anna Peter Lembile, the 1st Respondent and Unyangala Auction Mart Limited, the 2nd Respondent. Briefly, the Appellant had an agreement with the 1st Respondent through which the former was to supply the latter with blood from Vingunguti abattoir. In the course of implementing the agreement, the parties differed and hence they found themselves in Ukonga Primary Court where the 1st Respondent was the Plaintiff and the Appellant was the Defendant. In that suit, the 1st Respondent triumphed in the battle and the Appellant was ordered to pay a total of **Tshs.50,581,000/=** as damages for the breach of contract. The decision of the Primary Court was made on 14th June, 2017.

At the instance of the 1st Respondent, Ukonga Primary Court nominated the 2nd Respondent as a Court Broker. In the execution of the said judgment of the Primary Court, it seems that the Court Broker was required to collect blood from UWAMIVI and deliver the same to the 1st Respondent until when the decreed amount is settled. It is assumed that as the Court could not find execution order to that effect.

From the records, in the course of executing the decision of the Primary Court, things went well until the time when the Appellant alleged that the 2nd Respondent has collected blood in excess of what was required to settle the decreed amount and delivered the same to the 1st Respondent. It was the position of the Appellant that the collected blood was worthy **Tshs. 48,000,000/=**.

On the other hand, it was the contention of the 1st Respondent that the blood worthy **Tshs.19,818,000/=** was collected by a third party in the name of Joseph Abdallah who according to him was known to the Appellant. He admitted to have collected the blood worthy **Tshs.21,7171,000/=** out of **Tshs.50,581,000/=** decreed by the Primary Court.

Out of that dispute, the Appellant sued the Respondents in the trial Court for:

1. The declaration that the collection of the blood in excess of the decreed amount was unlawful.
2. That the 1st Defendant be ordered to specific damages to the tune of Tshs.48,000,000/= plus interest of twenty percent for every delayed month.

3. The 2nd Defendant be ordered to pay specific damages of Tshs.6,000,000/=.
4. The 1st and 2nd Respondents be jointly and severally ordered to pay general damages to the tune of Tshs.100,000,000/=.
5. Costs.
6. Any other reliefs which the Court think fit to grant.

During the trial, three issues were framed with a view to determining the dispute as follows:

1. Whether the Defendants are liable for the amount of blood collected by the party named Joseph Abdallah.
2. Whether the Defendants unlawfully and illegally collected blood in excess of what was decreed by Ukonga Primary Court.
3. Whether the Plaintiff was responsible for protecting the blood from intruders.
4. What remedies the parties are entitled to.

After the trial, the Court answered all issues in negative. Aggrieved by the decision of the trial Court, the Appellant preferred this appeal armed with three grounds as follows:

1. That the trial Court erred in law and fact by failing to evaluate and analyze the evidence adduced by the parties during the trial.
2. The trial Court erred in law and fact by deciding in favour of the Respondents while there was blood which was collected from the abattoir as ordered by Ukonga Primary Court in the absence of the Court Broker who passed away two or three weeks after being appointed.

3. The trial Court erred in law and fact after shifting the responsibility /duty of executing the decree of the Court from the Court Broker to the Appellant.

At the hearing of the appeal, the Appellant was represented by Mr. Kelvin Luambano, learned Counsel. On the opposite side, Messrs. Elias Lugomela and Benjamin Marwa, both learned Counsel represented the Respondents.

Submitting with regard to the first ground, Mr. Luambano, learned Counsel argued that the trial Court erred in refusing to admit the documentary evidence which was attached to the Plaint and marked P2 on the ground that it was a copy. He vehemently contended that the trial Court misdirected itself because the same document was attached in the Written Statement of Defence as AP-2. It was his submission that through such document the 2nd Respondent admitted that Joseph Abdallah had illegally collected blood in his presence as the Court Broker.

In buttressing his argument, the learned Counsel visited the provisions of section 67(1)(b) and (3) of the Tanzania Evidence Act, Cap.6 which, according to him, secondary evidence may be tendered and admitted if the adverse party agrees in writing that he will use the document in his case. The learned Counsel for the Appellant was a firm view that since the Respondents have attached the said document in their Written Statement of Defence, the provisions of section 67(1)(b) and (3) are operative to the extent of sanctioning tendering and admission of secondary evidence.

Further, the learned Counsel contended that the trial Court defeated the ends of justice on the Appellant's part by not considering the demand letter written by the Mr. Elias Lugomela at the instance of the 1st Respondent. He submitted that in the said demand letter, the 1st Respondent was demanding from Joseph Abdallah the sum of **Tshs.48,996,000/=** being part of the amount which she was supposed to get from the execution of the decree if the latter would not have illegally collected the blood. To him, such letter evidenced that Joseph Abdallah while collecting blood was known and sanctioned by the 1st Respondent.

Apart from that, the learned Counsel for the Appellant averred that the trial Court failed to consider the judgment and ruling of the Ilala District Court and Ukonga Primary Court respectively. He submitted that the judgment of Ukonga Primary Court was a result of the complaints lodged by the 2nd Respondent against Joseph Abdallah. In that judgment, Joseph Abdallah was found guilty and sentenced before being set at liberty by the ruling of the Ilala District Court. It was Mr. Luambano's submission that after the decision of the Ilala District Court to set free Joseph Abdallah, the claimed amount was supposed to be paid by the Respondents because the 2nd Respondent did not appeal.

Continuing with the first ground, learned Counsel for the Appellant submitted that the trial Court failed to consider the document that reflects dates, quantity and value of the blood collected by Joseph Abdallah and 1st Respondent. That document, he submitted, was titled "MAKUSANYO YA DAMU NA THAMANI YA PESA".

On ground two, Mr. Luambano, learned Counsel submitted that the trial Court erred in deciding in favour of the Respondents without considering that after the death of Mr. Sanga, the Director of the 2nd Respondent, such Respondent ceased to have legal authority to continue with execution as the Company did not have any qualified Court Broker. In view of this, it was his submission that between 6th July, 2018 (When Mr. Sanga joined his ancestors) and January, 2020 all money collected from the sales of blood should be submitted to the Appellant as the 2nd Respondent did not have qualifications to execute the decree.

In respect of ground three, Mr. Luambano contended that it was not true that the Appellant permitted Joseph Abdallah to collect blood. This is due to the fact that once a Court Broker is appointed to execute the decree, the judgment debtor as it was for his client ceases to have powers over the attached property until the completion of the execution. In that case, the Appellant was not in control of the blood and hence it cannot be said that it permitted Joseph Abdallah to collect blood.

Responding to the contentions of the learned Counsel for the Appellant, Mr. Lugomela, learned Counsel for the Respondents submitted on ground one that the former did not provide sufficient reasons to justify tendering of secondary evidence. With regard to demand letter, he submitted that the same was considered in page 4 of the judgment of the trial Court. It was his submission that the demand letter was written inadvertently.

Regarding the ruling of the Ilala District Court which set free Joseph Abdallah, the learned Counsel submitted that such ruling does not negate the fact that Joseph Abdallah collected blood. It was further

submitted that Joseph Abdallah was not permitted by the 2nd Respondent to collect blood. He contended that when Mr. Sanga died, he notified the Court vide letter dated 20th January, 2020. He was of the position that the trial Court evaluated the evidence adduced before it.

On ground two, Mr. Lugomela contended that the ground raised a new issue which was not part of the trial. He prayed the Court to reject the ground.

Submitting on ground three, it was his contention that his counterpart has misdirected himself as at the time of instituting the matter before the trial Court there was no execution in progress. In view of that it cannot be argued that the Court has shifted execution from the Court Broker to the Appellant. In summing up, he averred that the Respondents did not collect blood in excess and hence they are not liable for **Tshs.48,000,000/=** as claimed by the Appellant.

Mr. Benjamin Marwa, learned Counsel in essence subscribed to what his colleague Mr. Lugomela submitted. Rejoining, Mr. Luambano reiterated his position in submission in chief.

Having gone through the records, pleadings and submission of both learned Counsel, I will direct myself to determine this Appeal by establishing whether the appeal has merits. In that cause, I will not produce arguments advanced by the legal minds unless it is necessary.

In the first ground, the issue for determination is whether the trial Court erred in sustaining an objection raised by the learned Counsel for the Respondents against admission of a copy of the letter with Reference No.GM/UAKM/01/1/19 dated 29th January 2019. The said letter was written by the 2nd Respondent to the Magistrate In charge of Ukonga

Primary Court. The thrust of that letter was to inform the Magistrate In charge the status with regard to collection of blood for the period between 20th June, 2018 and 4th December, 2018.

According to the proceedings, the trial Magistrate sustained the objection raised by the learned Counsel for the Respondents on the ground that section 66 of the Tanzania Evidence Act requires documents to be proved by original documents. Responding to that objection, Mr. Luambano, learned Counsel for the Appellant contended that the author of that letter (Mr. Sanga) has passed away and that it is impossible to find the original document. He was of the position that since the Respondents have attached the said letter in their Written Statement of Defence, the copy of the said letter should be admitted by the Court as the Respondents have acknowledged the letter in their defence.

In sustaining the objection, the trial Magistrate noted that for the learned Counsel for the Appellant to tender a secondary evidence, provisions in relation to the exceptions of the general rule under section 67 was supposed to be applied. Essentially, he was of the view that since the author of the said letter is the 2nd Respondent, the learned Counsel for the Appellant was obliged to request the original from the former. Further, the trial Magistrate ruled that in any other case, tendering of the copy of the said letter was supposed to be supported by a prior notice to that effect.

With due respect to the learned Counsel for the Appellant, his argument that he could not find the original copy of the said letter on account of the death of Mr. Sanga is totally misplaced. This is due to the fact that at the time when the letter was authored, Mr. Sanga was resting in

peace for almost six months. The said letter was written by 2nd Respondent as a company and was signed by one of its directors namely P. Sanga.

However, section 67(1)(b) of the Tanzania Evidence Act, Chapter 6 provides exceptions to the general rule. According to that section, secondary evidence can be admitted if the adverse party has admitted in writing the existence, condition or contents of the original document. It reads:

'(1) Secondary evidence may be given of the existence, condition or contents of a document in the following evidence cases—

- (a);*
- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;'*

Deducing from the proceedings, the learned Counsel for the Appellant argued in that line that the Defendant had pleaded and attached the said letter in the Written Statement of Defence. In that case, the provisions of section 67(1)(3) sanctions admission of a secondary evidence which has already been pleaded and admitted by the adverse party.

With due respect to the trial Magistrate, the learned Counsel for the Appellant was right to tender a copy of the document which was

authored by the 2nd Respondent and admitted to form part of his case. In that case, the trial Court was supposed to admit that document pursuant to the provisions of section 67(1) (b) and (3). This Court in the case of JCDECAUX Tanzania Limited v. Imperial Media Agencies Limited and Frank John Nicodemus, Commercial Case No. 203 of 2017 decided that:

'It is right that from the above section 67 (1) (b) when the existence, condition or contents of the original document have been proved to be admitted in writing by the person against whom it is proved, then a copy of such a document can be admitted. The counsel for the Defendant disputed to have admitted the existence of the contested document. In the 1st Defendant WSD, the response to the contents which referred the tendered agreement is reflected in Paragraph 5. In that paragraph, the Defendant neither denied nor admitted. In this kind of a situation, the law presumes admission, which means the person is admitting the fact (Order VIII Rule 5 of the CPC). Since the 1st Defendant did not dispute the existence of this document, the words in the Written Statement of defence amounts to admission. Consequently, the exception in Section 67 (1) (b) of the Evidence Act applies in this matter.'

It is my conviction that the trial Magistrate misdirected himself for failing to admit a copy of the document tendered by the Appellant which was pleaded also by the Respondents in Paragraph 4 of their

Written Statement of Defence. Further, since the Respondents noted partly the contents of Paragraph 8 of the Plaint which attached the copy of the said letter, there was no sufficient grounds to object the same during the hearing. This ground of appeal has a merit so far as non admission is concerned.

In view of that stance, as the first appellate Court, this Court had the opportunity of examining the rejected exhibit which was attached as P2 in the Plaint. In that letter, the 2nd Respondent informed the Magistrate in charge of Ukonga Primary Court that the 2nd Respondent started to collect blood in the execution of decree issued by the Primary Court on 20th June, 2018 until 4th November, 2018 when it stopped to execute the decree due to the demise of Mr. Sanga who was the Court Broker. The letter stated that until 4th November, 2018, the 2nd Respondent had collected blood worthy **Tshs.21,717,000/=**. It was further stated that during that period Joseph Abdallah who is termed in that letter as a person who contravened the decree of Ukonga Primary Court has collected blood worthy **Tshs.19,818,000/=**. The 2nd Respondent concluded that if Joseph Abdallah would not have collected blood, the judgment holder who is the 2st Respondent would have collected blood worthy **Tshs.41,535,000/=**.

From that letter, it is clear the 2nd Respondent admits to have collected blood worthy **Tshs.21,717,000/=** between 20th June, 2018 to 4th November, 2018. Further, it is apparent that the 2nd Respondent distances itself from Joseph Abdallah to the extent of stating that had Joseph Abdallah not collected blood, the 1st

Respondent would have collected bloody worthy
Tshs.41,535,000/=.

From that interpretation of the letter which the learned Counsel wanted it to be admitted as part of the Appellant's evidence in the trial Court, it is undoubtedly that the 2nd Respondent admitted to have collected bloody worthy Tshs. **Tshs.21,717,000/=** between 20th June, 2018 to 4th November, 2018 as part of the decreed amount of **Tshs.50,581,000/=**. It is further clear that the 2nd Respondent disassociated itself with Joseph Abdallah.

Concerning the demand letter (Exhibit P4) that it was not considered by the trial Court, I will not dwell on that issue since the trial Magistrate considered the same to establish that Joseph Abdallah collected blood. Further, from the look of the said demand letter, there is no any hint that supports the Appellant's case due to the following reasons:

1. 1st Respondent was the judgment holder executed by the 2nd Respondent who was appointed by Ukonga Primary Court and in view of that she was not supposed to complain with regard to what Joseph Abdallah was doing. The one who was supposed to complain was the 2nd Respondent.
2. 1st Respondent put clearly in that letter that Joseph Abdallah has been collecting blood without legal authority to the extent of causing disturbances to her. In that case, the allegations that 1st Respondent permitted Joseph Abdallah to collect blood are unfounded through the said letter.

In view of the above reasons, I am inclined to hold that the demand letter (Exhibit P4) does not support the Appellant's case.

In his submission, the learned Counsel for the Applicant told this Court that the trial Magistrate failed to consider the ruling and judgment of the Ilala District Court and Ukonga Primary Court (Exhibit P2 and P3 respectively). On the other hand, the learned Counsel for the Respondent argued that the said ruling and judgment were irrelevant in proving that the Respondents are responsible for blood collected by Joseph Abdallah.

I had an ample time to peruse the judgment of the Ukonga Primary Court and the ruling of the Ilala District Court. With regard to the judgment of the Ukonga Primary Court dated 1st July, 2019, that judgment was reached at the instance of the 2nd Respondent contrary to what PW1 Wilhelem Boniface Pombe testified. This is due to the fact that the said judgment stated:

'Tarehe 29.6.2019 Unyangala Auction Mart akawasilisha taarifa ya utekelezaji akidai pamoja na mambo mengine kuwa kuna kundi la watu waliojitokeza katika eneo la utekelezaji (machinjio ya Vingunguti) na kwamba wamezuia utekelezaji wa amri halali ya mahakama. Watu hao aliwataja kuwa ni Joseph Abdallah, Tungu Mbuya, Monica Athanas, Christina Joseph na Shabani Mambomba.

Kufuatia tuhuma hizo mahakama iliwaandikia watuhumiwa wato kufika mahakamani kutoa sababu

ni kwa nini wasishtakiwe kwa kuzuia utekelezaji wa amri halali ya Mahalama.'

Needless to say, from the excerpt above, it was the 2nd Respondent who initiated the proceedings which in the end led to the conviction of Joseph Abdallah for contempt of court as the Ukonga Magistrate Court found him guilty for contravening order of the court. It should be noted here that the conviction against Joseph Abdallah had nothing to do with any claim with regard to the blood collected by him. The conviction, as I said, was due to his contempt of court's order.

Regarding the ruling of the Ilala District Court, this was reached by the Court in exercising its revisional jurisdiction in criminal matters. According to that ruling, the District Court found that in sentencing Joseph Abdallah, the Primary Court acted *ultra vires*. Likewise, the said ruling did not address any claim in respect of collection of blood.

In view of this, though the trial Court did not consider the ruling and the judgment, having done so as the appellate court, I am convinced that such ruling and judgment were irrelevant so far as they do not establish that the Respondents are liable for the blood collected by Joseph Abdallah.

Mr. Luambano, learned Counsel for the Appellant submitted further that the trial Court failed to consider the document titled "MAKUSANYO YA DAMU NA THAMANI YA PESA" which depicts date, quantity and value of the blood collected by 1st Respondent and Joseph Abdallah. As the appellate Court, I took time to go through the said document.

According to that document, between 20th June, 2018 and 4th November, 2018, the 1st Respondent collected blood worth

Tshs.21,717,000/= whilst Joseph Abdallah collected blood worthy **Tshs.19,818,000/=**. This document seems to be prepared by the Officer Incharge of the Vingunguti Abattoir on 29th April,2019. That document has been endorsed by the stamp of the Appellant and the 2nd Respondent.

At this point, I asked myself that if the Appellant did not know Joseph Abdallah, how did it append its stamp in that document. I am of the settled mind that Joseph Abdallah was known to the Appellant and since the Appellant was aware of the transactions between it and Joseph Abdallah did append his stamp on the said document.

From the foregoing, its is clear that the issues which were framed by the trial Court were correctly determined. In respect of second and third grounds, the evidence adduced before the trial Court and evaluated herein crumbles them down.

Appeal is allowed with costs.

Right to appeal explained.

DATED at DAR **ES SALAAM** this 5th **day** of October, **2022**.



KS Kamana

JUDGE



COURT: Ruling delivered in the presence of both learned Counsel for both parties.