

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF MWANZA
AT MWANZA**

HC. CIVIL APPEAL NO. 42 OF 2021

(Arising from Civil Case No. 07 of 2019 in the District Court of Magu at Magu)

HASHIMU HASAN KIJUU.....1ST APPELLANT

ISHA IBRAHIM NYAHONGE2ND APPELLANT

VERSUS

MASALU JACKSON LUHUYERESPONDENT

JUDGMENT

9th March & 9th May, 2022

Kahyoza, J.

Hashimu Hasan Kijuu and **Isha Ibrahim Nyahonge** (the appellants) are spouses. **Masalu Jackson Luhuye** purchased land from **Hashimu Hasan Kijuu**. **Isha Ibrahim Nyahonge** is allegedly to issue a spousal consent. Interestingly **Isha Ibrahim Nyahonge** decried to consent to the disposal of the suit plots. The purchaser **Masalu Jackson Luhuye's** efforts to possess the land proved futile as he discovered that **Hashimu Hasan Kijuu** was not the owner. Thus, **Hashimu Hasan Kijuu** had no title to pass to him. He sued the appellants for fraudulent

misrepresentation claiming among others, specific damages of Tzs. 60,000,000/=. The trial court found the appellants liable for fraudulent misrepresentation, awarded **Masalu Jackson Luhuye** Tzs 45,000,000/= as specific damages and various interests.

Aggrieved, the appellants lodged a memorandum of appeal containing three grounds of appeal. Later, they filed seven additional grounds of appeal. At the hearing, the appellants abandoned the memorandum of appeal arguing only additional grounds of appeal. The appellants and **Masalu Jackson Luhuye** had services of learned advocate. Mr. Innocent Michael represented the appellants while Mr. Emmanuel appeared for **Masalu Jackson Luhuye**.

It is beyond dispute that **Hashimu Hasan Kijuu** and **Masalu Jackson Luhuye** entered into a sale agreement. **Hashimu Hasan Kijuu** agreed to sell and **Masalu Jackson Luhuye** agree to procure the landed property situated at Plots No. 1, 2, 3, 4 Block "B" Bukelebe Kisesa Trading Centre- Mwanza. The contract price was Tzs. 50,000,000/=. **Masalu Jackson Luhuye** paid instantly Tzs. 40,000,000/= before the executing the sale agreement. The remaining amount was to be paid in future. **Hashimu Hasan Kijuu** and **Masalu Jackson Luhuye** executed a sale

agreement before the hamlet chairman of Bukelebe- Kanyama village and also before Mr. Fidelis Mtewele advocate. In his efforts to transfer the purchased land, **Masalu Jackson Luhuye** found a caveat that the purchased land did not belong **Hashimu Hasan Kijuu**. The registrar of titles' record showed that the purchased land belonged to Mohamed Hassan Mohamed. **Masalu Jackson Luhuye** sued the appellants for fraudulent misrepresentation.

Hashimu Hasan Kijuu deposed that they concluded a sale agreement after **Masalu Jackson Luhuye** searched and verified that he (**Hashimu Hasan Kijuu**) owned the land. He refused to involve any of his family members including the second appellant. He agreed to sign an agreement before the hamlet chairman and before the advocate. He, however, denied to received payments from **Masalu Jackson Luhuye** as consideration.

Isha Ibrahim Nyahonge, the second appellant, refused to be involved in sale transaction. She negated to give a spousal consent.

Was Pw3's evidence credible?

The appellants sought to challenge the evidence of Priscus (**Pw3**) that he was not reliable as it contradicted the respondent's pleadings.

Priscus (**Pw3**) was the land officer. He dealt with the parties to this case after **Masalu Jackson Luhuye** applied for transfer of ownership. He examined the documents and found that there was another person claiming ownership of the land the first appellant sold to the respondent. After the discovery, Priscus (**Pw3**) ordered the first appellant and Mr. Mohamed who was the register owner to surrender documents of ownership. Mr. Mohamed tendered his document of ownership. The first appellant promised to tender documents in vain. Priscus (**Pw3**) summoned the village leader in 2008 when Mr. Mohamed Hassan Mohamed purchased the land in question. Priscus (**Pw3**) established that Mr. Mohamed Hassan Mohamed had a better title than the first appellant.

During cross-examination, Priscus (**Pw3**) informed the court that the first appellant told him that he misplaced a sale agreement, so he had no document to prove how he acquired the suit land. Priscus (**Pw3**) concluded that the first appellant had no title to pass to the respondent. The appellants' advocate submitted that Annexure E showed that the disputed land was acquired on 27th Dec. 2015 after the District Land Committee authorized the transfer. While Paragraph 9 of the plaint stated they started the process of registration of the plot in disputed after

completion of payment in 2018. He argued that the contents in the letter and Priscus (**Pw3**)'s testimony are at variance. The appellants' advocate submitted that the effect of contradicting evidence was clear, it renders the evidence unreliable. He cited the cases of **Sabato Thabit & Another v. R.**, Cr. Appeal No. 441/208 and **Mohamed Said Matula v R.**, [1995] TRL. 3. In the latter case, the Court of Appeal held that where there are contradictions and inconsistency the Court should address the inconsistency and try to resolve them where possible.

The respondent submitted that there was no contradiction between the Annexure E and the testimony of Priscus (**Pw3**). He submitted also that the document was not tender to court, so it was not scrutinized or was Priscus (**Pw3**) given an opportunity to explain.

I perused the annexure E and contents of paragraph 9 of the plaint. Paragraph 9 of the Plaint reads "*That upon completion of payment and entering possession of the said premises, the plaintiff started the process of registration via the Commissioner of Land of Magu, who issued letters to the Registrar of titles with Ref. No. LD/MG4036/10/JKM, LD/MG4037/10/JKM, LD/MG4038/10/JKM and LD/MG4039/10/JKM* " Copy of the letters of the Commissioner of land on plot 1,2,3, and 4 are hereto

annexed collectively and marked as Annexure E" courts leave is hereby craved so that it can form part of this plaint".

I also read the letters. I see no contradictions for the reasons; **One**, that the respondent did not tendered the letters as exhibits. A party cannot seek to rely on an exhibit not tender in court. I agree that parties are bound by their pleadings, however, a document to be relied upon it must be admitted as exhibit. **Two**, even if annexure E has evidential value by a mere fact that it was attached to the Plaint, still, I do not find any contradiction between its contents and Priscus (**Pw3**)'s evidence. Priscus (**Pw3**) told the trial this court that on the 9.10.2018 his subordinates tabled to him files asking him to authorize ownership of the pieces of land to the plaintiff (respondent). He did what was required of him, he forwarded the same to the Local Land Commissioner requesting him to authorize the plaintiff to own the land. He deposed that after a week, on 23. 11. 2018, he came across another application for transfer referring to the same plots of land. The applicant was Mohamed Hassan Mohamed. Mohamed Hassan Mohamed commenced the process to transfer the land on 17. 20. 2011. He summoned the parties and one Mohamed Hassan

Mohamed. Priscus (**Pw3**)'evidence is on page 37 and 38 of the typed proceedings.

I reiterate that I see no contradiction. On 9.10.2018 Priscus (**Pw3**) wrote annexure E to the effect that **Masalu Jackson Luhuye** was the owner of the land in question. He was informing the commissioner for lands to transfer the land to **Masalu Jackson Luhuye**. On 23.11.2018 he found out that there was another person applying to be registered as the owner of the land in question. He decided to summon the parties to find out who was the legal owner. Priscus (**Pw3**) established that the first appellant had no title. After that discovery, on 3.12. 2018, Priscus (**Pw3**) wrote to the Land Commissioner to notify him to revoke the requested transfer in favour of **Masalu Jackson Luhuye**. He added that the Land Commissioner investigated and authorized ownership of the land in question in the name of Mohamed Hassan Mohamed. I find Priscus (**Pw3**)'s evidence in four walls with the contents of the plaint.

In the end, I find Priscus (**Pw3**) a credible witness and that there was no contradicting evidence. I dismiss the first ground of appeal as baseless.

Did the second appellant give a spousal consent?

The appellants complained in the second ground of appeal that the trial court erred to conclude that spousal consent was not issued. The appellants' advocate submitted that the trial court did not scrutinize exh. P3, the spousal consent, as it did not have the name of the person who identified the second appellant to the notarizing officer. He added that the second appellant did not sign the consent.

The respondent submitted that the advocate who notarized the sale agreement is the same person who notarized the spousal consent. He added that the appellants' advocate assertion that the second appellant did not give a spousal consent was an afterthought.

I see no merit in the second ground of appeal. Let us agree with the second appellant that she never consented her husband to sell the disputed land. Does that make the first appellant owner of the suit land? The issue central to this case is whether the first appellant obtained money from the respondent by fraudulent misrepresentation and not whether the first appellant obtained spousal consent from the second appellant before transferring land ownership to the respondent. Even if, the issue was whether the first appellant obtained spousal consent from the second appellant before transferring land ownership to the respondent, the fact

that the exh.p.3 bears the second appellant's photograph and signature purporting to be hers, is sufficient evidence to prove her participation. It was submitted on behalf of the second appellant that exh.p. 3 does not show the name of a person who identified her to the notarizing officer. It is true that the notarizing officer did not indicate a person who identified the second appellant to him. Looking at exh.p.3 it is obvious that the advocate put a dash on the space left meant to indicate a name of a person who introduced the second appellant to the advocate, which implies that he knew the second appellant. He did not want anyone to introduce her to him. I am of the view that the respondent proved on the balance of probability that the second appellant gave a spousal consent.

In addition, the second appellant never disputed the allegation that she consented in her written statement of defence. The respondent (the plaintiff) alleged under paragraph 6 of the plaint that the second appellant being the first appellant's wife consented and assured the respondent that the land belonged to them. In their joint written statement of defence of the appellants stated that-

"That the contents of paragraph 5, 6 and 7 are noted save for paragraph 8 which is disputed and the plaintiff is put to strict proof thereof"

It is clear as daylight that the second appellant did not dispute the allegation she was the first appellant's wife, consented to the sale and assured the respondent that the land belonged to them (the appellants). Therefore, **Masalu Jackson Luhuye** had no duty to prove that second appellant was the first appellant's wife and that she consented to the sale and assured him that the land belonged to them (the appellants). It is therefore, an afterthought to allege at this stage, that second appellant never consented. I find no merit in the second ground of appeal. I dismiss the same.

Was the trial court duty bound to call a witness?

I now turn to the third ground of appeal. The appellants complained that the court failed to exercise its judicial duty of calling upon one Hassan Hashim allegedly owner of the suit premises instead relied on the contradictory evidence of Priscus (**Pw3**) and pleadings to determine ownership of the suit land. To support the third ground of appeal, the appellants' advocate submitted that the Court ought to have called Mohamed Hassan to establish who was the legal owner of the suit house.

The respondent's advocate submitted that a person called Hassan Hashim is nowhere stated in the trial court's record. There was no any

relevance to call such a person. He added that even if, there was a need to summon Hassan Hashim, that person's evidence was not dispensable as there was the evidence of the land officer. He argued that the land officer is the custodian of the documents and records of all surveyed land.

It is a cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. See the decision in the case of **Anthony M. Masaga v Penina (Mama Mgesi) and Lucia (Mama Anna)** Civil Appeal No. 118 of 2014. The trial court alleged anything so it had no duty to call witness to prove or disapprove anything. It was a duty of the parties to prove their allegations. I will be the last person to fault a trial court for not calling a witness. A court's right to call witness is a matter of discretion. It is trite law that an appellate Court should not interfere with the exercise of the discretion of a lower court unless it is satisfied that the lower court in exercising its discretion has misdirected itself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice. See the holding **Mbogo & Another versus Shah** [1968] E.A. 93. I do see any circumstance to warrant this court to interfere by finding that the trial court abused its discretion by not call its witness.

Furthermore, I don't see any ground why should the trial court be condemned for not calling Hassan Hashim. Hassan Hashim was not denoted anywhere in the trial court proceedings. I am alive of the fact that the appellants stated in the memorandum of appeal that the court erred not to call Hassan Hashimu, however, during hearing of the appeal, the appellants' advocate submitted that the trial court erred not to call Mohamed Hassan. It is obscure as to which person was the court required to summon. Is it Hassan Hashim or Mohamed Hassan? I will take it that it was Hassan Hashim as stated in the memorandum of appeal. If the appellants' advocate sought he mistakenly wrote Hassan Hashim instead of Mohamed Hassan, he should have amended the memorandum of appeal. There was no reason for the trial court to summon Hassan Hashim as he had no any tangible evidence and it is not duty bound to so under the law.

I dismiss the third ground of appeal.

Can a claim be based on fraudulent misrepresentation without proving first the offence of fraud?

The appellants complained in the fourth ground of appeal that the court erred to rely on alleged criminal matters not proved in any in court of competent jurisdiction. The appellants' advocate submitted that the trial

magistrate based his decision on fraudulent misrepresentation. He contended that the trial court dealt with a criminal issue in a civil suit. He added that the magistrate totally erred to assume that there was obtaining money by fraudulent means. He concluded that the suit was prematurely decided it should have awaited the outcome of the criminal case.

The respondent's advocate replied that there was no reliance on criminal matter. He submitted that the trial magistrate stated that the claim was based on false misrepresentation. False misrepresentation is a tortious claim, he submitted. He argued that the law was clear, that if a person relies on false misrepresentation he must state facts which he relies upon. See rule 4 of Order VI of the **Civil Procedure Code, Act**, [Cap. 33 R.E. 2019]. To support his contention that a claim of misrepresentation is based on tort and contract, he cited the case of **Independent Power TZ Limited and Another v. Standard Chartered Bank and 2 Others** Civ. Case No 6/2014 (unreported).

Let me commence with a simple illustration that a thief, apart from facing criminal charges may also be sued in a civil court for a tort of conversion or a person may avoid instituting a criminal case and file a claim for conversion. Conversion is a common-law remedy for the unlawful

interference with the goods of another. **Winfield and Jolowicz on Tort** 15th Ed., Pg 588 says **that conversion may be committed by wrongfully taking possession of goods, by wrongfully disposing them, by wrongfully destroying them or simply refusing to give them up when demanded.**

It is not surprising that the evidence may be insufficient to establish a criminal offence, be sufficient to establish a civil claim. The standard of proving a criminal case is higher than that of proving a claim. Generally, most criminal offences or charges may translate into somewhat parallel civil causes of action. W.T. Major © 1990 elucidates the above in his book titled the **Law of Torts**, Chapter six at page 64 Major W.T. (1990) (**The Law of Torts**. In: Basic English Law. Macmillan Professional Masters. Palgrave, London)-

"The purpose of the criminal law is to punish those who are found guilty of crimes by process in the criminal courts. This is quite a different purpose from that of the law of torts which is to compensate those who have suffered loss or injury as a result of another's wrong. Most crimes which cause injury or damage to persons or to property are also torts. It is thus quite possible that a wrongdoer will be tried and punished by the criminal courts as well as sued in tort for compensation by

the person who suffered the injury or loss, although it should be noted that some recent statutes have given the criminal courts a power to award restitution or to grant compensation in certain restricted circumstances.” (emphasis added)

Reverting to the present case, person may decide not to institute a criminal case for fraud or obtaining money or services by false pretence, sue for compensation false misrepresentation or fraud. A fraudulent misrepresentation is a false statement knowingly made with the intent to induce a person to enter into a contract. To prove a claim for fraudulent misrepresentation, the plaintiff must be able to prove the following six elements: **one**, that a representation was made; **two**, that the representation was false; **three**, that the representation, when made, was either known to be false or made recklessly without knowledge of its truth; **four**, that the representation was made with the intention that the other party rely on it; **five**, that the other party did, in fact, rely on the representation; and **lastly**, that the other party suffered damages as a result of relying on the representation. There is no need to prove that the defendant was previously convicted with the offence of fraud or otherwise.

I find that the respondent proved through Priscus (**Pw3**)’s evidence that the first appellant did not own land he sold to the respondent. Thus,

the first appellant made false allegation. The first appellant knew that the land did not belong to him. He had no documents to prove his title. According to Priscus (**Pw3**)'s evidence, the first appellant failed to produce them to him. The first appellant also failed to tender documents of title before the trial court. He made false statement that he owned the land while in actual fact he knew it was false. The first appellant made the statement to induce the respondent to enter a contract. The first appellant lured respondent, who entered a contract, paid purchase price and got nothing in return.

I find that the respondent was not required to await the outcome of the criminal court where the first appellant was charged with the offence of fraud to institute a claim for fraudulent misrepresentation. I, therefore dismiss the fourth ground of appeal.

Did the trial court err to award specific damages?

The appellants complained that the trial court erred to award specific damages basing on the criminal accusation. The appellants' advocate submitted that the offence of fraud was not proved so the trial court could not have awarded damages for unproved criminal accusation.

I will not dwell on this issue. I found that the respondent was entitled to claim under tort. The allegations that the decree was based on unproved criminal accusation has no room. The fifth ground of appeal is unmerited.

Did the trial court usurp jurisdiction?

The appellants complained that the trial court erred to decide that the suit belonged to Hassan Hashim while it had no jurisdiction to determine ownership. He submitted that the trial court had no jurisdiction to determine the issue of land ownership.

The respondent's advocate replied that the trial court did not adjudicate on the issue of land ownership. He referred to the decree to show that the trial court did not decided anything relating to the land dispute.

Being the first appellate court, I scrutinized the evidence and the pleadings. The suit was based on false misrepresentation. The respondent proved that the first appellant sold him land, which did not belong to them. There were no parties contesting over land ownership. The trial court would not have determined an issue which was not contested. After all, the appellants never gave evidence to establish that they have title to the disputed land. They had a duty to establish on the balance of probability

that they owned land sold to the respondent after the respondent proved that they had no title to that land. I find no merit in the sixth complaint. I dismiss it.

Can a criminal case be held to be *res subjudice* to a civil suit?

Lastly, the appellants' advocate complained that the trial court violated the principle of *res subjudice* by entertain a civil suit instituted after criminal case No. 2 of 2019, which was still pending. The appellants are complaining through their advocate that the trial court erred to determine the civil suit without awaiting the criminal case to be concluded. He submitted that the trial court violated the principle of *res subjudice*.

The respondent's advocate submitted that the principle of *res subjudice* does not apply, as the parties are different and the standard of proof is different in the two cases.

There is no doubt that the respondent complained to police that the first appellant obtained money by false presence. The police arrested and charged the first appellant vide criminal case No. 2 of 2019. Before the criminal case was determined, the respondent opened the current civil claim before Magu district court.

I wish to state at the outset that if it was not a position of the law that grounds of appeal raised must be determined, I would not have answered the seventh ground of complaint. The seventh ground of appeal is misplaced and a disgrace to lawyers. The principle of *res subjudice* is found under the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC). The CPC regulates civil claims and not criminal matters. Not only that but also rule 8 of the CPC is cock clear, it refers to suits. It stipulates-

8. No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed.

The principle of *res subjudice* prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it. Thus, the principle of *res subjudice* applies where there are **two suits** involving the **same parties or between parties** under whom they or any

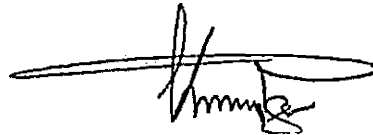
of them is litigating under the same title where such suit is pending. In the present case, one case was criminal case and another one a civil suit, hence, the principle cannot apply.

I dismiss the seventh ground of appeal.

Eventually, I uphold the district court's finding and dismiss the appeal for want of merit with costs.

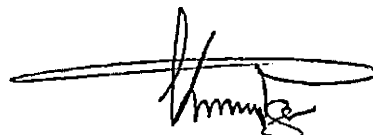
It is ordered accordingly.

DATED at **Mwanza** this 9th day of **May**, 2022.



J. R. Kahyoza
JUDGE

Court: Judgment delivered in the presence of Mr. Lucas Bundala, advocate for appellants, the first appellant and Mr. Kenedy Mwakalinga, advocate for the respondent and in the absence of the second appellant and the respondent. B/C Ms. Jakline (RMA) Present.



J. R. Kahyoza
JUDGE
9/5/2022