

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
BUKOBA DISTRICT REGISTRY**

AT BUKOBA

(PC) CIVIL APPEAL NO. 4 OF 2022

(Arising from Civil Appeal No. 27 of 2020 of the District Court of Karagwe, original Civil Case No. 16 of 2020 Mabira Primary Court)

GODWINI YORONIMO.....APPELLANT

VRS

LEONARDINA VEDASTO.....RESPONDENT

JUDGMENT

24/03/2020 & 29/04/2022

NGIGWANA, J.

This is a second appeal in which the appellant Godwin Yoronimo has set two grounds of appeal reproving the judgment and decree of the first appellate court to wit; Karagwe District Court at Kayanga in Civil Appeal No. 27 of 2020 handed down on 30/03/2021.

The grounds of appeal raised in the 1st appellate court were as follows: -

- 1. That, the trial court erred in law to rely on contents of exhibit "P1" which was tainted by serious procedural illegality.*
- 2. That, the trial court erred in law to find out that appellant sold "shamba" vide consideration of Tshs. 1,500,000/=*

It is the appellant's prayer that this appeal be allowed with costs. That, the judgment, decree be set aside.

In this matter, the court process server Mr. Rwiza Rwemela sworn an affidavit showing that the respondent refused to receive the summons. The Hamlet leader Mr. Prudence Kakoko who initially attempted to serve the respondent indicated in the court summons that the respondent had refused to receive the summons. In that respect, the respondent filed neither reply to the petition of appeal nor entered appearance; as a result, the hearing proceeded in her absence.

The background of this matter can be traced way back in 2018. On 26/10/2018, the appellant purchased a piece of land from the respondent at the tune of TZS. **1,500,000/=**, but 18 months later, it was discovered that the land which was purchased by the appellant was not the property of the respondent. In that premise, the appellant Godwin Yoronimo filed a civil suit against the respondent in the primary court of Mabira within Kyerwa District in Kagera Region, which was registered as Civil Case No. 16 of 2020 claiming the refund of **TZS. 1,500,000/=**.

After full trial, the trial court was satisfied that the appellant had proved his case to the balance of probability, hence decided the matter in favor of the Appellant. The respondent was aggrieved hence appealed to the District Court of Karagwe.

In the District Court, the learned Magistrate, after hearing the appeal, agreed with trial court that the appellant now respondent sold a piece of land to the Appellant at a price of TZS. 1,500,000/=. The evidence of PW1 and PW2 which was corroborated with the evidence of DW1 and DW2 supported the findings of the 1st appellate court is to that effect.

Eventually, the District court concluded its judgment as follows;

“Therefore, this court has found that the trial court misdirected itself for failure to evaluate the evidence of the parties as a result, it reached to unfair decision as the case was not proved on the balance of probabilities. In the upshot, I allow the appeal and quash the decision and order of the trial court which required that appellant to pay TZS. 1,500,000/= as the case was not proved on balance of probabilities. It is ordered that this case be tried denovo”

Aggrieved by the decision of District Court, the Appellant has come to this court armed with two grounds of appeal;

- 1. That, the District Court Magistrate erred in law and fact for failure to take into to consideration of watertight evidence which was adduced by the appellant in the Primary Court to support his own claim of 1,500,000/= against the respondent and thus the appellant proved his own case beyond balance of probability:*
- 2. That, the District Court Magistrate erred in law and fact by basing its finding on contradictory and inconsistent evidence of the respondent in which the District Court failed to make proper evaluation of evidence on record on the balance of probability.*

During the hearing of this appeal, the appellant had nothing to add, but urged the court to consider his grounds of appeal and do justice. Now the major issue for determination is whether this appeal is meritorious or otherwise.

It is common understanding that the role of the second appellate who appeared in person, unrepresented court is to determine matters of law only **unless** it is shown that the courts below considered matters, they should not have considered or failed to consider matters they should have considered, or

looking at the entire decision, it is perverse. **See Otieno, Ragot & Company Advocates versus National Bank of Kenya** [2000] e KLR

Regulation 1(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, 1963 requires the claimant to prove all the facts necessary to establish the claim, however, it is an established principle of the law that a civil case must be proved on the balance of probabilities.

Regulation 6 of the Magistrates (Rules of Evidence in Primary Courts) Regulations, 1964, which reads;

"In Civil Case, the court is not required to be satisfied beyond reasonable doubt that a party is correct before it decides the case in its favor, but it shall be sufficient if the weight of the evidence of the one party is greater than the weight of the evidence of the other".

The principle of law further demands that a person with heavier evidence than his/her adversary must win the case. This stance of the law was stated in the case of **Hemedi Saidi v. Mohamedi Mbilu [1984]** TLR 113 thus;

"According to the law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".

Part of the trial court judgment reads;

"Mahakama hii baada ya kupitia ushahidi wa SM1, SM2 na SU3 imeona ni kweli mdaiwa Leordina Vedasto anadaiwa na Mdai Tshs. 1,500,000/= zitokanazo na mauziano ya shamba kwa kielelezo P1 mkataba kati ya mdai na mdaiwa walikuwa wanadaiwa shamba walilouziana kwa mkataba P1 na shamba hilo halikuwa mali ya Leordina Vedasto (Mdaiwa) katika shauri hili; Dafroza

Vedasto binti yake na mdaiwa katika shauri hili alikabidhiwa shamba hilo kwa kutoka kwa mdai ndipo ilipelekea mdai kumdai Leordina Vedasto pesa alizonunulia shamba hilo."

The 1st appellate court agreed with trial court that the appellant now respondent that she had sold a piece of land to the Appellant at a price of TZS 1,500,000/= . The evidence of PW1 and PW2 which was corroborated with the evidence of DW1 and DW2 is to that effect and having gone through the records, I do agree that is the evidence available in the trial court record.

Regulation 8 (1) (b) of the Magistrates (Rules of Evidence in Primary Courts) Regulations, 1964 provides that facts can be proved by evidence which may be the production of documents by witnesses (documentary evidence). Regulation 11(2) of the Regulations provides:

"Where documentary evidence is produced, oral evidence must be given to connect not with the case".

In the trial court, the sale agreement dated 26/10/2018 was tendered and admitted as **Exh.P1**. The same reads as follows;

"Mimi Leodina Vedasto nimekubaliana na familia yangu kuuza shamba langu yenye thamani ya milioni moja na nusu (Tsh1,500,000/=) kumuuzia ndugu Godwin Yoronimo. Tumemuuzia Eka moja na nusu....."

Since it is apparent that the piece of land that was sold to the Appellant was not the property of the respondent, the appellant is entitled to be refunded his money at the tune of TZS. 1,500,000/= as decided by the trial court. It is therefore apparent that the decision of the 1st appellate court was erroneously arrived, thus liable to be reversed.

It is again surprising that a re-trial was ordered while the entire trial court proceedings were not nullified, meaning, they were still intact. Only the judgment and orders thereto were quashed and set aside. That is evidence that, the first appellate court did not discharge its duty judiciously.

In the event, appeal is allowed; the decree and judgment of the District court are set aside. The judgment and decree of the Primary Court are hereby confirmed and restored. For avoidance of doubt, the Respondent should refund to the appellant the sum of **TZS. 1,500,000/=** as per trial court decision. It is so ordered.




E. L. NGIGWANA
JUDGE

29/04/2022

Judgment delivered this 29th day of April, 2022 in the presence of the Appellant in person, Mr. E. M. Kamaleki, Judges' Law Assistant, and Ms. Tumaini Hamidu, B/C, but in the absence of the respondent.




E. L. NGIGWANA
JUDGE

29/04/2022