

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA**

PC CIVIL CASE APPEAL No. 28 OF 2021

*(Arising from the District Court of Musoma at Musoma in Civil Appeal No. 30 of 2021 &
Originating from Musoma Urban Primary Court in Civil Case No. 173 of 2021)*

**1. JOYCE BURIGA &
2. JAMES MANG'ERERE** } ----- **APPELLANTS**

Versus

BWIRE NYAMWERO ----- **RESPONDENT**

JUDGMENT

09.03.2022 & 25.03.2022

Mtulya, F.H., J.:

The **District Court of Musoma at Musoma** (the district court) in **Civil Appeal No. 173 of 2021** (the appeal) on 27th July 2021 resolved the appeal on a dispute originated from **Musoma Urban Primary Court** (the primary court) in **Civil Case No. 173 of 2021** (the case) regarding *mabondo ya sangara* (mabondo). After full hearing of the appeal, the district court allowed the appeal with costs and held that Ms. Joyce Buliga & Mr. James Mang'erere (the appellants) to pay Mr. Bwire Nyamwero (the respondent) the sum of Tanzanian Shillings Three Hundred Thousand being a total value of *mabondo* which were involved in business transaction between the appellants and respondent.

The text of reasoning of the district court in the appeal is found at page 5 of the judgment and displays the following words:

My reasons in so finding are simple. They include the admissions by the respondents [the appellants] to have taken the so called mabondo from the appellant [respondent] without paying for the same. The failure by the respondent to join the said Naftari S. [Mbodi] in the case or even to call him as their witness...in absence of employment contract between respondents [the appellants] and Mr. Naftari S. Mbodi, and business contract between the appellant [respondent] and Mr. Naftari, then it was not proper for the trial court to find that the case in question was not established by the appellant [the respondent] at the balance of probabilities.

Record in this appeal show that the primary court on its part when it was invited to determine the case, it decided in favour of the appellants and had different reasoning in arriving its decision as is displayed at page 3 of the judgment delivered on 21st May 2021:

Mahakama baada ya kupitia ushahidi wa pande zote mbili, inasema kuwa maelezo ya upande wa wadaiwa yamekuwa ni mazito kulinganisha na mdai...mdai

alieleza kuwa 24/3/2021...alimpigia simu mdaiwa Na. 1 ili kwenda kupima mabondo. Ndipo mdaiwa Na. 1 alienda na mdaiwa Na. 2 na kupima mabondo ambayo yalionekana kuwa na thamani ya TShs. 300,000/= ambapo waliahidi kulipa pesa kesho yake...vipi [mdai] amshtaki mdaiwa Na. 2 pamoja na mdaiwa Na. 1 kulipa Tshs. 300,000/= thamani ya mabondo...pia maelezo ya mdaiwa Na. 1 kwamba hawadaiwi Tshs. 300.000/= pesa ya mabondo kwa kuwa hawakuingia makubaliano yeyote na mdai na kwamba anayedaiwa ni boshi wao aitwae Naftari S. Mbodi umeonekana kuwa ni utetezi mzito kulinganisha na maelezo ya mdai...

It is the two decisions of the lower courts and their associated reasoning which brought the parties in this court. In this court, the appellants had filed a total of three (3) reasons to dispute the decision of the district court, which show the following complaints: first, the district court disregarded the fact that the respondent phoned the first appellant to collect mabondo after a contract of the respondent and Naftari S. Mbodi; second, the district court raised the issue on non-joinder of Naftari S. Mbodi *suo moto*; and finally the district court erred to hold the second appellant

responsible for payment or contribution of payment of Tshs. 300,000/= without any cause of action against him.

The parties were summoned in this court on the 9th March 2022 to give plausible explanations for and against the grounds of appeal. The first appellant on her part, she briefly stated that: firstly, she had no any contract or transaction deal with the respondent, but it was the respondent and Mr. Naftari S. Mbodi who had entered into contract of *mabondo* sale; second, she was not given the right to be heard when the issue of calling Mr. Naftari S. Mbodi as a party or witness when the issue of Mr. Naftari S. Mbodi cropped up in the district court during the hearing of the appeal; and finally, she submitted that the second appellant was wrongly joined in the case as he just escorting the first appellant in taking *mabondo* on behalf of Mr. Naftari S. Mbodi.

On his part, the second appellant submitted that there were business communications between the respondent and Mr. Naftari S. Mbodi and he had no any communication or business transactions with the respondent. To his opinion, the decision of the primary court in the case exonerated him from civil liability of the *mabondo* business transaction as he was escorting the first appellant. Finally, the second appellant prayed this appeal be allowed and this court restore the decision of the primary court in the case.

The respondent on his part protested the appeal arguing that he did not communicate or had any business transaction with Mr. Naftari S. Mbondi and that there is no any evidence which was recorded in the primary court during the hearing of the case to substantiate the allegation of communications between him and Mr. Naftari S. Mbodi To the opinion of the respondent, the record shows that there were communication between the appellants and Mr. Naftari S. Mbodi hence the appellant must be accountable to their boss.

With regard to the second reason, the respondent submitted that the appellants mentioned Mr. Naftari S. Mbondi in their defence and registered several facts relating to Mr. Naftari S. Mbodi at the primary court during the hearing of the case, but declined to join him as a party in the proceedings or call him to testify in favour of their allegations. According to the respondent, the duty was upon the appellants to call Mr. Naftari S. Mbodi and cannot claim the right to be heard at the district court.

Finally, the respondent submitted that the record in the primary court in the case is silent on the second appellant's role of escorting the first appellant. To the respondent's opinion, the dual went to his resident together with the same aim and purpose of taking *mabondo* and promised to pay the *mabondo* money on the next day, and in

any case the second appellant was the one who made follow-ups of *mabondo* business licence. Finally, the respondent submitted that this court should not trust people with mere words without evidence and if trusted, justice delivery will be at jeopardy in this State.

In brief rejoinder, the first appellant replied generally that the primary court in the case did not assist the appellants by informing them to call or join Mr. Naftari S. Mbodi as they are lay persons without any legal background and in any case there were no evidence recorded in primary court showing communications between the second appellant and the respondent. Similarly, the second appellant re-joined generally that the appellants had no any communication or business transactions with the respondent.

I scanned and perused the record of this appeal and found out that the materials which were registered in the primary court in the case show that on 24th March 2021 *mabondo* transaction activities took place at the respondent's residence as depicted at page 5, 7, 9, 11, & 13 of the proceedings of the primary court. At page 5 of the proceedings, the respondent is recorded to have said that:

*Mnamo tarehe 24/03/2021, nilimpigia simu mdaiwa Na. 1
ili aje kupima mabondo ya samaki aina ya sangara
nyumbani kwangu kwa kuwa nimekuwa nikimuuzia*

mabondo hayo. Mdaiwa Na. 1 alikuja na mdaiwa Na.2. Walianza kusafisha mabondo hayo na baadaye kupima kwa mafungu ya ukubwa wa mabondo hayo. Tulipata jumla ya Tshs. 300, 0000/=. Wadaiwa wote wawili walisema hawana hela ya kulipa usiku huo, hivyo wataileta kesho yake. Kesho yake hawakuleta pesa...tarehe 29/03/2021 nilienda ofisini kwa mdaiwa Na. 2 kufuatilia pesa yangu...tulijadili...walisema bado hawajauza mzigo hivyo nisubiri ndani ya siku tatu, nilikubali...lakini tokea hapo hawajanilipa pesa hiyo.

The facts registered by the respondent were supported by Veneranda Anatory Biseko (SM.2) who testified at page 7 of the proceedings of the primary court that: *niliwaona wadaiwa wawili uwani nyumbani kwangu wakitengeneza na kusafisha mabondo.* On her part, the first appellant did not dispute or cross examine the respondent on the important materials registered by the respondent and his witness (SM.2) in the primary court, but claimed at page 9 of the proceeding that: *nilipigiwa simu na bosi wangu aitwae Naftari S. Mbodi na kuniambia niende kupima mizigo ya mabondo nyumbani kwa bwire kwa kuwa tayari walikuwa wamekubaliana... Nilienda na mdaiwa Na. 2 na kupokelewa na mdai.* When the first appellant was questioned on evidence of communications between the respondent

and Mr. Naftari S. Mbodi, she replied at page 11 of the proceedings that: *maelezo ya wewe kukubaliana na bosi Naftari nitathibitisha mwenyewe...Mimi hunidai,bali nafahamu unamdai bosi wangu...nathibitisha mwenyewe kuwa nilikuwa mfanyakazi wa Naftari.*

Similar defence is displayed by the second appellant at page 13 of the proceedings of the primary court in the case. The primary court had recorded the second respondent during the hearing of the case testifying that: *nakumbuka 24/03/2021, nilipigiwa simu na mdaiwa Na. 1 na kunieleza kuwa amepigiwa simu na bosi, Naftari watu kutotaka kwenda kupima mabondo nyumbani kwa mdai...hivyo alinipitia na tukaenda nyumbani kwa mdai...alitueleza kuwa watamalizana. Ndipo baada ya kazi hiyo, tuliondoka...tokea hapo sijawahi kufahamu kama walikwisha lipana pesa hiyo...*

When the second appellant was questioned on *mabondo* business transaction and where-about of Mr. Naftari S. Mbodi, he replied at page 13 & 14 of the proceedings of the primary court that:

...sijawahi kufanya biashara na wewe bali siku hiyo nilifika kupima kwa kutumwa...siwezi kumleta Naftari kwa sababu mimi sikufanya naye biashara...nathibitisha kuwa

*mabondo tulimpa Naftari kwa kuwa ndiye aliyetutuma
kuja kupima na ndiye alikuwa mwajiri wetu.*

The materials registered by the parties in the primary court in the case show that the parties were generally agreeing on the existence of the *mabondo* sale agreement and taking of the same *mabondo* by the dual appellants from the respondent's residence. However, the parties are specifically at horns on whether who exactly transacted *mabondo* business for payment. The appellants' opinions are that the business was conducted and concluded by the respondent and Mr. Naftari S. Mbodi, and their role was only to wash and transport the same to Naftari S. Mbodi. However, the nexus between the appellants and Naftari S. Mbodi is not displayed anywhere on the record. Similarly, the relation between the appellants and Naftari S. Mbodi was not substantiated by any tangible evidence. It was just mere words which can be stated by any person.

I am aware that during the hearing of the present appeal, the respondent contended that this court should not trust people who are taking properties of other persons and mentioning accountabilities to third parties, who are not joined in the case or called to testify. To his opinion, if this court trust and grant rights to persons without evidence, then justice delivery in this State will be

at shambles. I am equally aware that the appellants claimed existence of telephone communications of *mabondo* business between the respondent and Mr. Naftari S. Mbodi, but declined to register any evidence related to the communications or at least contents of the communications.

I understand, the dual appellants complained the right to be heard. I am conversant that the right to be heard is no longer natural or human right. It is currently constitutionally guaranteed under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and has already received a bundle of precedents in the decisions of the Court of Appeal (see: **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44; **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251; **Tanelec Limited v. The Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 20 of 2018; and **Ponsian Kadangu v. Muganyizi Samwel**, Misc. Land Case Appeal No. 41 of 2018).

However, the right cannot be invited and applied in a situation where the appellants were mentioning a third person Mr. Naftari S. Mbodi, as a necessary party or key witness who could have assisted the primary court to testifying and replying two important issues,

viz. first, whether Mr. Naftari S. Mbodi contacted the respondent by telephone on 24th March 2021 for *mabondo* business; and whether Mr. Naftari S. Mbodi had directed the appellants to go and take *mabondo* for him. The law established by the practice of the Court of Appeal is that failure to call material witnesses or cross examine witnesses on important matters, entitles the court to draw an adverse inference as against the appellants (see: **Martin Misara v. Republic**, Criminal Appeal No. 428 of 2016; **Joseph Mkumbwa & Another v. Republic**, Criminal Appeal No. 64 of 2007; and **Azizi Abdallah v. Republic** [1991] TLR 71].

The purpose of calling material witnesses is to confirm or support insufficient materials in disputes so as to have sufficient and satisfactory evidences. The general and well known rule is that parties in disputes must register all facts, evidences and witnesses, which, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the party who has not performed its duty.

It is fortunate that during the proceedings in the primary court both respondents were consulted and asked by the respondent to perform their duties by calling Mr. Naftari S. Mbodi. Their replies are

reflected at page 1 and 14 of the proceedings in the primary court. The first appellant stated that: *...nitathibitisha mwenyewe...mimi hunidai, bali nafahamu unamdai bosi wangu...nathibitisha mwenyewe kuwa nilikuwa mfanyakazi wa Naftari*, whereas for the second respondent the reply was: *...siwezi kumleta Naftari kwa sababu mimi sikufanya naye biashara...nathibitisha kuwa mabondo tulimpa Naftari kwa kuwa ndiye aliyetutuma kuja kupima na ndiye alikuwa mwajiri wetu*. Under such circumstances, the appellants cannot claim that the district court declined their right to be heard or raised the issue of non-joinder of the third necessary party or material witness, Mr. Naftari S. Mbodi.

I am well aware that no particular number of witnesses is required for proof of any fact in cases brought before our courts as per section 143 of the Evidence Act [Cap. 6 R.E. 2019] (the Evidence Act) which received interpretation in the precedents in **Selemani Makumba v. Republic** [2006] TLR 376 and **Yohana Msigwa v. Republic** [1990] TLR 148. What is important is the weight of materials tendered in courts to substantiate cases. However, in the present case, it cannot be said that Mr. Naftari S. Mbodi is not necessary party or material witness. Similarly, there are no materials which displayed Mr. Naftari S. Mbodi was out of the reach. In any case, he was not mentioned by the respondent, but appellants. It

was unfortunate that the dual appellant failed to call him even after consultation during the hearing of the case in the primary court.

I have noted since the hearing of the case at the primary court, both appellants were claiming that the second respondent is not party to *mabondo* transaction and cannot be held responsible for escorting the first appellant to the residence of the respondent. However, the record of this appeal does not support the move. The respondent had welcomed the first and second appellants at his residence and had given them *mabondo* on promise that the dual will pay the respondent on the next day. That promise was never honoured. Similarly, the facts showing the dual went and took *mabondo* on promise to pay the next day, were not disputed by the appellants both in the primary court and district court. Even during the hearing of this appeal, the dual appellant remained silent on the facts.

The facts registered in the primary court during the hearing of the case show further that at one time the respondent went to the second appellant to inquire on his *mabondo* monies, but the second appellant did not exonerate himself from the transactions and payment, but called the first appellant to see how they can settle the monies. The wording recorded in the primary court shows that the respondent complained that: *tarehe 29/03/2021 nilienda ofisini kwa*

mdaiwa Na. 2 kufuatilia pesa yangu...tulijadili...walisema bado hawajauza mzigo hivyo nisubiri ndani ya siku tatu, nilikubali...lakini tokea hapo hawajanilipa pesa hiyo. This is the second time the second appellant is seen to have contact with the respondent on *mabondo* deal. The second appellant had not disputed these facts or exonerated himself from this day from the liability, or informing the respondent on his role in the *mabondo* transaction. Instead, he communicated with the first appellant to see how to settle the matter. Under such circumstances, it is difficult to state that the second appellant was not part of the deal. This court is not a place where parties may wish to file disputes to ignore their liabilities.

Following the scanning of the present record in this appeal, I have no reason to interfere with the findings of the district court in the case. In the event, I find this appeal has been brought in this court without sufficient reasons and the same is hereby dismissed in its entirety and costs awarded to the respondent.

It is so ordered.

Right of appeal explained.



F. H. Mtulya

Judge

25.03.2022

This judgment was delivered in Chambers under the seal of this court in the presence of the first appellant, Ms. Joyce Buliga and the respondent, Mr. Bwire Nyamwero through teleconference.



F. H. Mtulya

Judge

25.03.2022