IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

PC CIVIL APPEAL NO. 48 OF 2021

(Arising from Civil Appeal No. 23 of 2021 from Nyamagana District Court. Originated from Mwanza Urban Primary Court in Civil Case No. 114/2021)

MALICERY MASESA---------- APPELLANT

VERSUS

MNYIVINDI MICROFINANCE CO. LTD---------- RESPONDENT

JUDGMENT

Last Order: 27/5/2022
Judgement Date: 30.05.2022

M. MNYUKWA, J.

The appellant herein instituted a Civil Case No. 114/2021 in Mwanza Urban Primary Court claiming against the respondent, properties worth a sum of Tsh 8,823,000/= allegedly to have been taken by the respondent from his house. Brief background of the case goes that; the respondent herein is the microcredit company that has advanced a loan to the tune of Tsh. 200,000/= to the appellant's wife through an oral contract and the

appellant was the guarantor of the said loan. That, the appellant's wife failed to pay the said loan in full as Tsh. 87,000/= remained unpaid for a long time after the expiration of the time of the contract. That, on 22/2/2021 without any notice the respondent's officers went to the appellant's house at 12:00 hrs and took some of the appellant's properties that were pledged as loan collateral after being allowed by the appellant's wife who said the appellant had consented for the properties to be taken. Aggrieved by the respondent's action, the appellant instituted a Civil Case No. 114/2021 before Mwanza Urban Primary Court claiming properties worth Tshs. 8,823,000/=.

At the trial court, the appellant gave his evidence and he had two witnesses who testified to have seen people breaking the appellant's door and taking some of the claimed properties from the appellant's house. The respondent had one witness who is the company director. He testified that the respondent's officers did not break the appellant's door, instead, the properties that are TV, dining table and one radio (subufer spiano siza) were given to them by the appellant's wife, who said that the appellant consented for the properties to be taken as they were loan collateral. The respondent tendered 3 exhibits **U-01, U-02** and **U-03**, which were the minutes of the meeting, summons and letter of agreement to pay the loan.

After hearing both parties to the case, the trial court partly allowed the claim to the extent of properties admitted to be taken by the respondent and ordered the said properties to be returned to the appellant as there was no proper notice given by the respondent before taking those properties. Aggrieved by the said decision, the appellant, appealed to the District Court of Nyamagana through Civil Appeal No. 23 of 2021 raising only one ground;

1. *That, the Hon. Trial Primary Court Magistrate erred in law and in fact to disregard the claim of the respondent with regard to the wrongly taken items, like solar battery, inventor, computer, dining table, iron bed, gas cooker, cupboard, fridge, sofa, with cash money to the tune of Tsh 4,098,000 on the ground that the appellant did not tender receipt to prove the ownership of the same.*

The 1st appellate court dismissed the appeal on the ground that, there was no satisfying evidence that the appellant owned claimed properties as rightly decided by the trial court. Being further aggrieved by that decision, the appellant is now appealing against the 1st appellate court's decision raising four grounds of appeal as follows;

1. *That, the learned Appellate District Court Resident Magistrate erred in law and fact when he failed to take into consideration the findings of the trial Primary Court, which held that the Appellant had proved that Respondent officials*

had illegally broken into Appellant's dwelling house and seized Appellant's households.

2. *That, the learned Appellate District Court Resident Magistrate erred both in law and fact when he failed to take into consideration that the Appellant's properties which were illegally seized by the Respondent officials are: -*

   (i) Cash Tsh. 4,098,000/=

   (ii) 4 PC Flash Worth Tsh. 100,000/=

   (iii) 1 Computer Table Worth Tsh. 850,000/=

   (iv) 1 Gas Cooker worth Tsh. 95,000/=

   (v) 1 Frigilater worth Tsh. 670,000/=

   (vi) 1 sola set worth Tsh. 720,000/=

   (vii) 1 steel Bed worth Tsh. 450,000/=

   (viii) 1 Cupboard worth Tsh. 350,000/=

   (ix) 2 Mobile Phones worth Tsh. 235,000/=

   (x) 1 Sunda TV Screen 43 inches worth Tsh. 550,000/=

   (xi) 1 Deck worth Tsh. 60,000/=

   (xii) TV Table worth Tsh. 85,000/=

   (xiii) 1 Subwoofer Radio Tshs 250,000/=

   TOTAL WORTH TSH. 8,823,000/=

3. *That the learned Appellate District Court Resident Magistrate erred both in law and fact when he held that Appellant had not proved ownership of the illegally seized properties against the Respondent's own admission that her company officials had illegally seized from Appellant's dwelling house on the fateful date of 22-2-2021.*

4. *That the learned Appellate District Court Resident Magistrate erred both in law and fact to dismiss Appellant's Appeal.*

The appellant prays for the appeal to be allowed, the judgement of the District Court be quashed and set aside, and an order for the respondent to return back appellant's properties mentioned in ground 2, an alternative order for the respondent to compensate the appellant to the tune of Tsh. 8,823,000/= being the value of illegally seized properties and costs of the suit.

When the matter came for hearing, both parties appeared unrepresented. The matter was argued orally.

In his submission, the appellant submitted that, the District Court erred to uphold the decision of the trial court while the respondent broke into his house and took his properties without claim of right and without having any lawful order from the court.

He went on that, the law put clear procedure for the creditor to collect his debt from the debtor. That, the respondent was supposed to go to the court of law to institute his claim and require the defendant to pay in order to maintain peace. He also prayed to adopt his memorandum of appeal to be part of his submission and finalised by praying his appeal to be allowed.

Responding, the respondent took off praying to adopt his reply to the memorandum of appeal to be part of his submissions. He then submitted that; the 1st appellate court was right to dismiss the appeal because the appellant failed to prove his claim as he failed to substantiate his claim. He further submitted that, they did not break into the appellant's house as claimed, the company's officers took the properties in the noon around 13:00hrs after getting consent from the appellant's spouse who is their client that took a loan and failed to pay.

He went on that; the appellant's wife was given loan through oral contract since she was pregnant. And that the appellant's wife was not brought before the court to testify. He prayed for the appeal to be dismissed.

In rejoinder, the appellant submitted that, the respondent failed to prove the case before the trial court as the appellant did in the trial court. That marks the end of both parties' submissions.

Having heard and carefully considered the appellant's and respondent's submissions, I now have only one issue to determine, which is whether this appeal is merited. From the four raised grounds of appeal by the appellant, it is my firm view that ground 2, 3 and 4 of the appeal revolves around one ground that, the 1st appellate court erred to hold that the appellant failed to verify his claim against the respondent at the trial

court, therefore I will determine them collectively. It is also my observation that the first raised ground of appeal was not raised at the 1st appellate court as the appellant had only one ground of appeal and so it was not determined.

Guided by the established principle of law that the second appellate court must only confine to the matters that were determined by the lower court, and as the first ground of appeal was not subject of determination in the first appellate court, I will not determine it. (See the case of **Nurdin Musa Wailu vs Republic**, Criminal Appeal No. 164 of 2004, **Thomas Peter @ Chacha Marwa vs Republic**, Criminal Appeal No. 553 of 2015 and **Florence Athanas @ Baba Ali & Another vs Republic**, Criminal Appeal No. 438 of 2016.)

Coming to the 2nd, 3rd and 4th grounds of appeal, as to whether the appellant managed to prove his case at the trial court, it is apparent that the two lower courts, had concurrent findings that the appellant failed to prove his claim as he failed to prove ownership of the claimed properties. Before I further determine this issue, it is prudent to remind ourselves to the well-established principle of law that, the second appellate court is bound not to interfere with the concurrent findings of the lower courts unless those findings led to misapprehension of justice. This was also

stated in the case of **Helmina Nyoni vs Yeremia Magoti,** Civil Appeal No. 61 of 2020, where it was held that;

> *"it is trite law that second appellate courts should be reluctant to interfere with the concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principles of law or procedure or have occasioned a miscarriage of justice"*

See also the case of **Nchangwa Marwa Wambura vs Republic**, Criminal Appeal No. 44 of 2017, **Osward Kasunga vs Republic,** Criminal Appeal No. 17 of 2017.

Now, the appellant was supposed to prove that his properties were taken by the respondent in order to conform with the rules of evidence in Primary Court that, the one who alleges must prove his claims except when the defendant admits those claims. This is provided under Regulation 1(2) of The Magistrates' Courts (Rules of Evidence in Primary Court) Regulations GN. No. 22 of 1964 which states that;

> *"1(2) where a person makes a claim against another in civil case, the claimant must prove all the facts necessary to establish the claim unless the other party (that is the defendant) admit the claim."*

The trial court records reveal that, the appellant had two witnesses that is PW2 who testified to have seen some of the properties taken from his home and PW3 who testified to have seen people who were breaking his door. On the defence evidence, the sole witness who is the director of the company, did not deny to have taken appellant's properties. However, his admission was to the three properties, which are, the dining table, TV, and radio (Sabufer spiano siza). If that was the case, then the trial court was duty-bound to see if the appellant's evidence as to the claimed properties except the one admitted by the respondent was satisfying and guided by the rules of evidence that are applicable in primary court.

The Magistrates' Courts (Rules of Evidence in Primary Court) Regulations GN. No. 22 of 1964, under Regulation 6, provides for the standard of proof of civil cases in Primary Court which is on the balance of probabilities. That is to say, the appellant herein was supposed to prove on the balance of probabilities that, the taken properties which he alleged to be legally owned by him were taken by the respondent herein.

Looking at the evidence given at the trial court, it is only the evidence given by SM2 which shows that he evidenced some of the properties taken from the appellant's house. Apart from that the appellant had no any evidence to exhibit that he either legally owned claimed properties or that the claimed properties were taken from his home. This

finding was also concluded by the trial court as well as the 1st appellate court on its judgement specifically on page 3 of the typed judgement.

Furthermore, I concur to the 1st appellate court's findings that, the appellant failed to bring the important witness who could have back up his evidence that his properties were not legally taken as his wife who was the respondent's customer did not consent for the properties to be taken and also that the properties taken were not subject to collateral of the loan she took. I say so because, the appellant's wife could at least enlighten the trial court as to which properties were taken that were not subject of collateral as she was a party to oral evidence between her and the respondent.

The Appellant's failure to bring that witness without sufficient reasons compel this court to draw an adverse inference towards the appellant's evidence that the claimed properties were either not taken or the one taken was collateral to the loan which his wife took from the respondent. The principle of adverse inference is well illustrated in the case of **City Coffee Ltd vs The Registered Trustee of Ilolo Coffee Group,** Civil Appeal No.94 of 2018 CAT Mbeya (Unreported), where the Court of Appeal drew an adverse inference that, failure of a party to bring an important witness without sufficient reason is for the reason that such witness might have given evidence against that party.

From those findings, it is apparent that the appellant failed to prove his claim before the trial court as he failed to prove that his properties claimed were taken by the respondent and that he legally owned those properties as it was rightly held by the trial court as well as the 1st appellate court.

On the foregoing, this appeal is hereby dismissed entirely with costs and the lower courts' decisions are hereby upheld.

It is so ordered.

M. MNYUKWA
JUDGE
30/05/2022

Right of appeal explained to the parties.

M. MNYUKWA
JUDGE
30/5/2022

Court: Judgment delivered this 30th May, 2022 in the presence of both parties.

M. MNYUKWA
JUDGE
30/5/2022