

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 242 OF 2019**

*(Appeal from the Judgement and Decree of the District Court of
Kinondoni at Kinondoni, Hon. J. Mushi-RM, in Civil Case No. 27 of 2017
dated 8th November, 2019)*

**THE REGISTERED TRUSTEES OF CONGREGATION OF
BROTHERS OF CHARITY OF TANZANIA.....APPELLANT
VERSUS**

TIMOTH KAYUNI.....1ST RESPONDENT

SALOME KAFURIA.....2ND RESPONDENT

Date of Last order: 23/11/2021

Date of Judgment: 13/05/2022

JUDGMENT

MGONYA, J.

The Appellant herein before the court is aggrieved by the Judgment and Decree of the District Court of Kinondoni at Kinondoni in **Civil Case No. 27 of 2017**, on the following grounds:

1. That, the Hon. Court grossly erred in law and fact in its Judgement and Decree in relying on and considering the Plaintiffs' final written submission

which was filed out of time without the leave of the Hon. Court,

2. That, the Hon. Court grossly erred in law and fact in its Judgement by not considering the Memorandum of Understanding admitted as Exhibit DW1,

3. That, the Hon. Court grossly erred in law and fact by considering and using "Special Review of Financial Performance and Present Value of Future Cash flow of Father Triest Dispensary" which did not meet the conditions governing the conduct and practicing of auditing,

4. That, the Hon. Court grossly erred in law and fact by failing to consider and evaluate the evidence tendered by DW1,

5. That, the Hon. Court grossly erred in law and fact by failing to elaborate as to whether the services of the dispensary should resume or not, and

6. That, the Hon. Court erred in law and in fact by failing to consider the Defendant's Counter Claim.

From the above grounds of appeal, the Appellant prays that the Honourable Court to order the following:

(a) The appeal be allowed,

(b) The Judgement and Decree of the trial Court be quashed and set aside, and

(c) Costs of this Appeal be borne by the Respondents.

After the hearing of the appeal, the Court ordered parties to file their final written submissions. Parties adhered to the court's scheduling order whereby Mr. Datus Mutalemwa learned Advocate represented the Appellant while Mr. Sylvester Mgonja learned Advocate represented the Respondents.

Submitting in support of the Appeal, on the **first ground**, it is the Appellant's concern that the Respondents' final written submission was filed out of time without leave of the court. Whereas, the Court ordered final written submission to be filed on or before **5th September, 2019** and the Respondents filed on **10th September, 2019** five days delayed out of time. That, the Defendants failed to act within the prescribed time and that they are guilty of diligence.

Further, on the **second ground of appeal** that the Hon. Court grossly erred in law and fact in its Judgement by not considering the Memorandum of Understanding admitted as Exhibit DW1. The trial Court *suo moto* held that the Memorandum of Understanding did not comply with Notary and Commissioner for Oaths Act. The Appellant holding the situation led to denial the right to be heard by the Court on the matter being contravening the Constitution of the United Republic.

Basing on the **third ground of appeal**, the Appellant's counsel stated that the Special Review of Financial Performance and Present Value of Future Cash flow of Father Triest Dispensary did not meet the conditions governing the conduct and practicing of auditing. Further that, the said projection report did not specifically state how the profit was going to be generated and was unilateral report prepared.

Moreover, the Counsel submitted on **fourth ground of appeal** that the Court failed to consider and evaluate the evidence tendered by DW1 basing on the terms and conditions of the Memorandum of Understanding. That, the failure to consider the DW1's testimony was unjustifiable and renders the contradictory judgement by the trial court.

Furthermore, the Appellant's counsel stated on the **fifth ground of appeal** that the Honourable Court failed to elaborate as to whether the services of the dispensary should resume or not. When the trial court concluded in its Judgement that there was a breach of the agreement by the Appellant and proceeded to grant the reliefs sought to the Respondents, it ought to have explained the life span of the dispensary.

On the **sixth ground of appeal**, the Appellant stated that the trial court failed to consider the Defendant's Counter claim. The trial court judgement did neither heard nor determined the Counter Claim, hence contravene the provisions of **Order VIII**

Rule 9 (2) of the Civil Procedure Code Cap. 33 R. E 2019

which states that:

"Where the counter claim is set up in a Written Statement of Defence, the Counter Claim shall be treated as across suit and the provisions of Order VII shall apply mutatis mutandis to such written statement of defence as if it were a plaint"

It is the Appellant's counsel concern that, the trial court ought to have heard and determine the Counter Claim along with determining the claim as a matter of law and rights of both parties into a suit. The failure of which has vitiated the proceedings and rendered the Judgement and Decree nullity.

On the contrary, the Respondents' counsel submitted on the **first ground of appeal** that, the Appellant has misconceived concerning the final submissions and written submissions which ordered by the court for parties to present their arguments in form of writing instead of oral hearing. Further that, it is known that final submissions are not evidence and they are not mandatory requirement.

The Counsel also submitted on the **second ground of appeal** that, the trial court perusing and considered the Memorandum of Understanding which later on held that was defective. That Memorandum was not signed by the Notary Public and Commissioner for Oath, hence became incomplete

document. The counsel further averred that, the Appellant failed to point out the one who signed on behalf of their organization and the drawer of it. In the same line, the Court ruled out that the Memorandum of Understanding has no authenticity, hence the Appellant ought to have brought evidence to prove genuineness of the document but had failed.

It was the Respondents' submissions on the **third ground of appeal** that, it is the duty of the Respondents to prove their case on balance of probabilities. That during the trial, the Appellant had an opportunity to exercise his right to cross examine witness and question the credibility and authentication of the Review Report by the Auditor. Further that, the Appellant at the trial court did not exercised her legal right to shake the Respondents witnesses evidence.

Further, on the **fourth ground of appeal**, the Respondents' counsel argued concerning the evaluation of evidence of the trial court. It is the Respondents' view that, the trial court was considered and evaluate evidence of DW1 properly. The Counsel referred the court to **pages 11, 12, 13 and 16** of the trial court's Judgement where the DW1 testified on registration and signing of the draft of Memorandum of Understanding which was not fully executed. Also, the trial court evaluated evidence of DW1 and DW2 both were unable to identify their representative who signed the draft.

Moreover, the Counsel submitted on the **fifth ground of appeal** that, the duty of the court was to decide the matter in dispute among the parties. The issue of resuming services of the dispensary falls on the authority which ordered closure of the same and same was not pleaded by the parties before the trial court.

The Respondents' Counsel submitted on the **sixth ground of appeal**, where at the trial court the Appellant raised the issue of Counter Claim. It is the Respondents' response that, the said concern was discussed and submitted by both parties at the trial. It is submitted that, the trial Court considered the Counter Claim and determined the same through the framed issues on the records.

Before I proceed to determine the grounds of appeal, having gone through the submissions of both parties and the records of the trial court, the Court noted that, there was an Agreement on management and operation of the dispensary between both parties. When they tried to put that agreement into writing, the conflict emerged between them. It is from the above situation, parties decided to knock the court's door purposely to resolve their dispute.

In determining the **first ground of appeal** that, court confirms that the parties herein at the closure of the trial, were ordered by the court to file their final submissions. The

Respondents filed their submissions out of time prescribed by the court. The question here is whether filing of the Respondents' final submissions out of time before the trial court was fatal. On various decisions of the Court of Appeal, it was directed that the final submissions were rather guidance to the court's decisions and not new evidence nor the alternative of the same. In the case of ***SUNLON GENERAL BUILDING CONTRACTORS LTD. AND OTHERS VS KCB TANZANIA LIMITED, CIV. APPEAL NO. 253 OF 2017 (Unreported)*** the Court cited the case of ***SOUTHERN TANGANYIKA GAME SAFARIS & ANOTHER VS MINISTRY OF NATURAL RESOURCES AND TOURISM & OTHERS [2004] 2 E. A 271***, at page 23 and held that:

"Final submissions are only intended to provide guide to court in resolving the framed issues, thus the decision in case can effectively rendered without parties' final submissions."

From the above position by the Court of Appeal, this court is of the view that, the final written submission filed out of time was of no effect. **This ground of appeal fails.**

In regard of the **second ground of appeal**, it is the court's observation that, the trial court considered the testimonies adduced by the parties and gave the standard weight of balance of probabilities. Further, the trial court made

thorough analysis based on the issue as to whether the parties entered into the said Memorandum of Understanding, and finally decided that the Memorandum of Understanding lacked essential element to be legally enforced. Hence, the parties are bound by their oral agreement on partnership referenced to the operation of the dispensary, joint account and division of dividends. Under **section 118 of the Law of Evidence Act, Cap. 6 [R. E. 2019]** provides:

"When the question is whether persons are partners, landlord and tenant, or principal and agent and it has been shown that they have been acting as such, the burden of proving that they do not stand or have ceased to stand, to each other in those relationships respectively, is on the person who asserts it."

From my considered view, the trial court fairly reached to a justified decision by considering the evidence adduced by both parties before the court. The trial court held that the parties were bound by their oral agreement on partnership rather than to be guided by defective Memorandum of Understanding which lacked legal enforcement. **This ground of appeal fails.**

Further, considering the **third ground of appeal** the trial court's records showed that at the trial the Appellant did not exercise her legal right to cross examine witness and no

questions raised over the credibility and authentication of the Review Report by the Auditor. In the case of **ATTANAS NGOMA V. R CRMINAL APPEAL NO. 57 of 2018** which cited the case of **KWIGA MASA V. SAMUEL MTUBWATA [1989] TLR 103**, it was stated that:

"where witness version during examination in chief is not challenged by way of cross examination the same is taken to be true"

From the above legal position, it is the court's stands that the Respondent has proved what has been asserted because the Appellant did not produced any evidence to prove otherwise. **This ground of appeal also fails.**

On the **fourth ground of the appeal**, this court had time to go through the trial court judgement on **pages 11, 12, 13 and 16** which referred to the court by the parties. The DW1 testified that he knew the Respondents who were looking for a place to rent for a pharmacy and a laboratory. Later on, they managed to operate through an oral agreement in which the Respondents were to use their professional practicing certificate for registration of the dispensary.

Also, it is evidenced in the records that, they signed the draft of Memorandum of Understanding which was not fully executed due to non commissioned by Notary Public and

Commissioner for Oaths. This assertion is supported by the words of trial court judgement on page 12 which provides that:

"... the trial court is of the opinion that the Memorandum of Understanding tendered did not comply with the Notary Public and Commissioner for Oaths Act as it was supposed to be witnessed by the Commissioner for Oaths prescribed by the law."

Likewise, the trial court evaluated evidence in the records of both **DW1** and **DW2** which were duly considered in the judgement of the court. **This ground of appeal has no merits.**

Moreover, on the **fifth ground of the appeal**, this court is of the opinion that, the core function of the court is to decide the matter in dispute between the parties. The trial court records did not show any facts that the court ordered to stop operation of dispensary. The issue of resuming the management and operations services of the dispensary falls on the authority which ordered its closure. The trial court could have not interfered due to fear of getting into a trap of setting up bad laws. In the case of ***ABEL MALIGISI VS PAUL FUNGAMEZA PC CIVIL APPEAL NO. 10 OF 2018 (Unreported)*** it was stated that:

"it is a bad law for the court to raise new fact and decide on un pleaded facts"

There are numerous decisions of this court and the Court of Appeal which always underline and discourage the court to deal with non pleaded facts to avoid setting up bad laws. **This ground of appeal is meritless.**

Lastly, on the **sixth ground of appeal** where the issue of Counter Claim that raised and alleged not to be determined by the trial court. The records speak louder, that after parties filed their pleadings and following the failure of mediation, the court together with the parties framed four issues which I beg to quote:

- 1. Whether there is exhibited a partnership agreement between the parties,***
- 2. Whether the plaintiffs are the owners of the dispensary,***
- 3. Whether there was a breach of contract agreement by the defendants, and***
- 4. What are the reliefs entitled to the parties?***

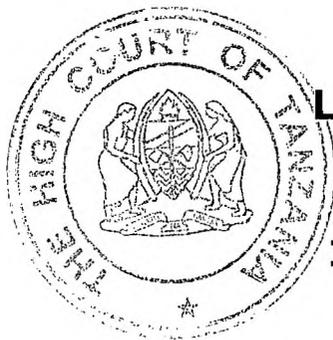
Apart from the above framed issues which contain the grounds of counter claim, at the trial court, the Appellant counted on the Claims of total sum of **TSHS 262,683,650:00/=**. Existence of Memorandum of Understanding and the Ownership and management of

dispensary. The records and judgement showed that the court discussed and determine all issues on merits. Hence, counter claim also discussed affirmatively. **Therefore, this ground also lack merit.**

In the event where all grounds of appeal have been declared meritless, the Appeal before this honourable court is hereby **DISMISSED with costs.**

It is so ordered.

Right of Appeal Explained.



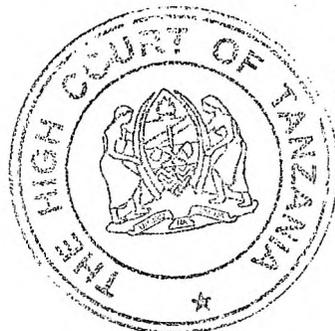

L. E. MGONYA

JUDGE

13/05/2022

Court:

Judgment delivered by Honourable J. Luambano Deputy Registrar in the presence of Mr. Mathias Kabengwa Advocate for the Appellant, in the presence of both Respondents appearing in person and Mr. Richard RMA on 13th May, 2022.




L. E. MGONYA

JUDGE

13/05/2022