

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA

PC. CIVIL APPEAL NO. 22 OF 2021

*(Originating from Civil Appeal No. 3 of 2018 of the District Court of Kyela
In original Civil Case No. 8 of 2018 of the Kyela Urban Primary Court)*

Between

GIDION MWAG'ONDA APPELLANT

VERSUS

JOSEPH SINYANGWERESPONDENT

JUDGMENT

Date of last order: 22/04/2022

Date of judgment: 19/05/2022.

NGUNYALE J.

This second appeal is against the judgment of the District Court of Kyela in Civil Appeal No. 3 of 2018 which affirmed the decision of the Kyela Urban Primary Court in Civil case No. 8 of 2018 for award of three cows or equivalent amount of Tsh. 2,100,000/= to the respondent.

Briefly, the respondent sued the appellant for recovery of three cows or equivalent amount of Tsh 2,100,000/=, chain and a hoe allegedly leant to the appellant in 2014. The appellant essentially did not dispute the claim

rather he asserted that he was given two cows. He also alleged that they reduced their contract into writing which was to come to an end in 2020. Upon full trial the trial Court found the claim of three cows established and it accordingly ordered the appellant to return three cows or pay equivalent value of Tsh 2,100,000/=. The appellant unsuccessfully appealed to the District Court. In affirming the trial Court decision, the District Court reasoned that the contract relied upon by the appellant was not produced during hearing, it expunged it for not forming part of the record. It further affirmed the award of three cows or payment of Tsh. 2,100,000/= s its value. The appellant is still aggrieved by the decision hence filed the present appeal containing six grounds. Namely;

- 1. That the trial Court erred in law and fact to ignore the documentary evidence which was relied by the primary Court during composition of its judgment.*
- 2. That the trial Court erred in law and fact to order payment of three cows, in absence of any evidence contrary to what have been agreed by the appellant and the respondent which show the contract was for two cows.*
- 3. That the trial Court erred in law and fact for failure to consider the judgment was invalid for relying on document which was not admitted and tendered as per prescribed procedures.*
- 4. That the trial Court erred in law and fact to hold that the evidence of the respondent was heavier based of number of witness attested before the Court and not weight of evidence adduced by the parties.*
- 5. That the trial Court erred in law and fact to order payment of Tsh 2,100,000/= to the respondent without any justification or evaluation on how Court reached into that amount*

6. *That the trial Court erred in law and fact for failure to evaluate evidence adduced by the parties and that arrived into wrong conclusion.*

When the appeal was called on for hearing parties agreed the appeal to be disposed through written submission. The appellant submission was drawn and filed by Emily Mwamboneke learned advocate of EM Law Office while that of the respondent was drawn and filed by the respondent himself.

Mr. Mwamboneke combine the first and third ground of appeal. He submitted that Court *suo moto* expunged from the record the contract without affording the parties an opportunity to be heard as the result the appellant was prejudiced.

In the second ground Mr. Mwamboneke submitted that the disputant had executed the written contract hence no oral evidence was required to contradict the contract. He added that parties were bound by the contract which was to end in 2020 and even the Court could not interfere with the terms of the said contract.

Mr. Mwamboneke submitted in the fifth ground to the effect that the award of Tsh 2,100,00/ as value of three cows was awarded without there being a valuation and evidence to that effect.

Replying to the first and third grounds of appeal the respondent submitted that the first appellate Court rightly considered that the contract was not produced, admitted and read in Court as per laid procedures.

In the second ground the respondent submitted that evidence of Maria Mwaluambano established that the appellant took three oxen.

Regarding fifth ground of appeal the respondent submitted that the trial Court as well as the first appellate Court clearly evaluated the evidence that the appellant took three oxen worth Tsh. 2,100,000/=

I have carefully considered the grounds of appeal the submissions made by the parties and examined the record before me. I will dispose the grounds of appeal in the sequence it was submitted by the parties. From the submission of the appellant, I agree with the respondent that fourth and sixth grounds were not submitted for. Therefore, this Court considers them impliedly abandoned.

Looking at the grounds of appeal all are based on facts. This being the second appeal I will start by reiterating a settled principle that, the second appellate Court should rarely interfere with the concurrent findings of the lower Courts on the facts unless there has been a misapprehension of evidence occasioning miscarriage of justice or violation of a principle of law or procedure. See the case of **Simon Kichele Chacha v Aveline**

M. Kilawe, Civil Appeal No. 160 of 2018, CAT at Mwanza and **Neli Manase Foya v Damian Mlinga**, Civil Appeal No. 25 of 2002, CAT at Arusha (Both Unreported).

The first and third ground have two limbs, one whether the trial relied on the said contract and two whether the District Court afforded parties right to be heard. On the first limb I don't agree with the appellant that the trial Court relied on the said contract in its decision. Part of the trial Court judgment reads;

'Makubaliano hayo yalifanyika tarehe 5/12/2017 na hakuna kiongozi yeyote kutoka kwenye serikali ya kitongoji ambao ndio waliandika ni kweli makubaliano hayo yalifanyika kihalai na haki ilizingatiwa.'

Based on the reasoning of the trial Court the said contract did not form the basis of its decision as the appellant want this Court to believe.

The second limb of first ground, the appellant complain that parties were not heard before expunging Exhibit D1. This argument is misplaced because the issue was not raised by the Court *suo moto*. It arose in the grounds of appeal in which parties were given an opportunity to submit for and against in their respective submission. The first appellate Court having reviewed the law regarding tendering and admission of documentary evidence was satisfied that it did not comply with the requirement of the law. Hence it proceeded to expunge it from the record

of the trial Court. Beside the final decision is not based on the expunged document rather full analysis and evaluation of evidence.

Be it as it may the first appellate Court was justified to expunge from the record the said contract at least for two clear reasons. One, it was received contrary to rule 11(2) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, G.N 22 of 1964 provides clearly that;

Where documentary evidence is produced, oral evidence must be given to connect it with the case.'

In this appeal apart from the appellant referring to the contract did not produce it to form part of his evidence. Although it is marked as kielelezo(SU1) but records are silence on how it got its way into the Court file.

Another reason is that it was a photocopy and no explanation was given contrary to rule 11(1)(a) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, G.N 22 of 1964. I associate with the decision of Judge Utamwa in the case of **Paulina D/O Nereson v Zawadi S/O Timothy**, PC. Matrimonial Appeal No. 1 of 2019 HC At Mbeya (Unreported) when he said;

'From the above quoted provisions of the law, it is lucid that, only original documents have to be tendered in evidence before primary Courts. In case a party wishes to tender a copy thereof, he/she has a duty to demonstrate that the listed conditions under Rule 11(1) (a) of the GN are met. As hinted

earlier, in the matter at hand, the record of the trial Court does not indicate that the appellant had demonstrated that the document met the conditions before it was admitted by the trial Court.'

Given the circumstance the first ground of appeal is dismissed for want of merits.

The second ground will not detain me much after dismissing the first ground. Going through evidence of the respondent in the trial Court it is not true that it was hearsay as submitted by the appellant. Evidence of the respondent and his witness Maria Mwaluambano was oral evidence which is admissible under rule 10(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, G.N 22 of 1964 as they both saw the appellant taking and being given three cows. I have gone through the evidence of parties in the trial Court and respective argument in the first appellate Court. With respect, the appellant has not provided any material to support the contention that the concurrent findings of the two Courts below were a result of misapprehension of the evidence, omission to consider available evidence or wrong conclusions from the facts or misdirection and non - directions of the evidence warranting interference. The second ground fails it is dismissed for being unmeritorious.

On fifth ground of appeal, the appellant submitted that the figure of Tsh. 2,100,000/= was reached by the Court without there being evaluation on


the value of the cows. In reply the respondent submitted that the Court was right in awarding Tsh 2,100,000/= as value of three oxen which could not have been awarded in kind.

In my considered view this ground is purely of facts which the two lower Court upon considering evidence were satisfied that three cows owed by the appellant had the value of Tsh. 2,100,000/=. In the plaint the respondent indicated that two cows had the value of Tsh. 800,000/= each and another Tsh. 500,000/ totalling Tsh. 2,100,000 which is the amount awarded by the two Courts below. The appellant has not cited any principle or law which was not considered by the trial Court in reaching the quantum.

Considering that there was no dispute that the appellant was given cows by the respondent. The issue of its number has already been resolved. The issue on value of each cow is of fact which is more suited to the trial Court assessment. In this appeal the lower Courts were satisfied with the amount of Tsh. 2,100,000/= for three cows. I find no reason to disturb these findings.

In all the circumstances, I am satisfied that the second appeal was rightly determined. In the result, the entire appeal is dismissed with costs.

DATED at Mbeya this 19th of May, 2022



D. P. Ngunyale
Judge
19/05/2022

Judgment delivered this 19th day of May 2022 in presence of both parties
in person.



D. P. Ngunyale
Judge
19/05/2022