

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

PC. CIVIL APPEAL NO. 07 OF 2022

*(Arising from Mbinga District Court in Civil Appeal No. 03 of 2022, Originated from
Mbinga Urban Primary Court in Civil Case No. 124 of 2021)*

MILAN ALAN MGENI APPELLANT

VERSUS

JUMA SELEMANI MASSARO RESPONDENT

JUDGEMENT

26.01.2023 & 02.02.2023

U.E Madeha, J.

The Appellant in this case, Milan Alan Mgeni, was the Respondent in Civil Appeal No.03 of 2022 before the District Court of Mbinga and he lost in that appeal. Being aggrieved by the decision in that appeal, he preferred this appeal. The grounds of appeal as they appear in his petition of appeal are as follows:

- 1. That, the first (1st) appellate Court erred in law and facts for failure to analyse, evaluate and scrutinize the evidence tendered before the Trial Court and decide in favour of the Respondent which was contrary to the law.*

2. *That, the first (1st) appellate Court erred in law and facts for failure to interpret the sale agreement (exhibit P1) and proceeded to order reimbursement of Tanzanian shillings four million (4,000,000/=) to the Appellant while the Respondent had handed over the house in question to the Appellant who repaired and developed the same.*
3. *That, the first appellate Court erred in law and facts to set aside the decision of the Trial Court which was contrary to the law.*

It is worth considering that, in this case Milan Alan Mgeni, who was the plaintiff before Mbinga Urban Primary Court, filed a claim for an amount of Tanzanian shillings twenty-four million (24,000,000) shillings against Juma Selemani Massaro who was the defendant. In fact, he claimed to have bought a house from the Respondent at a cost of thirty million (30,000,000) Tanzanian shillings. He claimed that in making payment for the house he paid eleven million (11,000,000/=) Tanzanian shillings and later on he asked for an extension of time to pay the remaining amount.

To add to it, the Appellant was able to enter in the building whereby he took forty-four (44) pieces of the office equipment. Notably, the

Appellant was given time to pay the remaining amount of money of nineteen million (19,000,000) Tanzanian shillings.

Principally, the total amount of claim the Appellant was claiming was twenty-four million (24,000,000) Tanzanian shillings which was the amount paid for the house purchase and the costs incurred for minor repairs made on the house. That, the sale contract which was witnessed by an advocate was admitted as exhibit before the trial Court. On the same note, the Appellant paid to the Respondent the final payment of an amount of one million (1,000,000) Tanzanian shillings and that was proved through exhibits Q1 & Q7. It is a fact that, Juma Selemani Massaro explained that they agreed with Milan Alan Mgeni regarding the house payment claims. Juma Sulemani Massaro agreed to sell the house to Milan Alan Mgeni for thirty million (30,000,000) Tanzanian shillings. As a result, he was given one million shillings on 11th November, 2020.

On the other hand, the Appellant promised the Respondent that he would have paid half of the purchase price by 18th November, 2020. In other words, he would have paid the total amount of fifteen million (15,000,000/=) Tanzanian shillings. Surprisingly, the Appellant failed to pay and he was surprised to find that he was sued for the claim of twenty-four

million (24,000,000/=) Tanzania shillings. After hearing of the case, the Court was satisfied that the Appellant had proved his claim.

It is worth considering the fact that, this appeal was canvassed by way of written submission, whereby the Appellant was represented by none other than the learned advocate Mr. Edmund Mnyawami and on the other hand, the Respondent appeared in person.

Notably, Mr. Edmund Mnyawami submitted that on the first (1st) ground of appeal which is mainly based on the evidence adduced before the Trial Court, the first (1st) appellate Court erred in law and facts to scrutinize and evaluate the evidence. To add to it, he averred that the Trial Court, correctly decided the matter basing on the testimonies given by the parties. He contended that the matter at hand was the contract for the sale of the house (Exhibit P1) which was executed on 11th November, 2010 before the learned advocate Gaudence Basilius Ndomba with the consideration of an amount of Tanzanian shillings thirty million (30,000,000) and an amount of Tanzanian shillings four million (4,000,000) was initially paid.

Furthermore, he argued that both parties agreed that the house will be handed over to the Appellant upon payment of the first (1st) installment something that was done as they agreed. Additionally, he further contended that the parties are bound to the terms of the said contract which is exhibit P1 in whatever manner they executed it. He added that, since the Respondent never objected the said contract, that means he agreed with all what was in the said contract. He argued that the contractual terms were to be respected. He made reference to the case of **Lulu Victory Kayombo v. Oceanic Bay Limited and Mchinga Bay Limited** (2021) TZCA 228 Consolidated Civil Appeal (Court of Appeal of Tanzania) whereby it was *inter alia* held that:

"Strictly speaking, under our law, once parties have freely agreed on their contractual clause, it would not open for the Court to change those clauses which the parties have agreed between themselves... it is not the role of the Courts to re-draft clauses in agreement but to enforce those clauses where the parties are in dispute."

Notably, he further averred that challenging the said contract at the appellate level, will be an aforethought as the same was never objected. He emphasized further that contractual clause number one up to number

eleven are clear and the parties honored the exhibit P1 as it was, that's why the house in question was handled over to the Appellant (Milan Alan Mgeni) as per paragraph five (5) of exhibit P1, something which was never disputed.

Also, he averred that the jurisdiction of the subordinate Court (Primary Court is governed by the Magistrate Court (Approval Forms for the primary Court) Rules. Principally, he submitted that the above-mentioned rules set out prescribed forms to be used to institute the proceedings in Primary Court where civil cases are instituted by filling "Fomu ya Madai Namba 2" titled "hati ya madai".

As a matter of fact, the said form among other things was required for the brief summary of the claim by stating the time place, value amount of the claim, under Rule 15 of the Magistrate's Court (Civil Procedure in Primary Courts) Rules (GN 119/1983). He stated further that the case at hand that is, the case was instituted contrary to the Magistrates Court (Approved Forms for the Primary Courts) Rules.

He further argued that the form which was used to institute the claims "Hati ya Mdai" did not disclose where and when the claims arose

which is contrary to the law. Failure to do so puts a question to whether the Trial Court has satisfied itself on the issues of the territorial Jurisdiction to entertain the claims brought before it. To crown it all, it was his humble prayer that this Court to allow the appeal with costs.

On the contrary, the Respondent submitted that; the central gravity of the appeal is the house purchase contract which had been entered between Milan Alan Mgeni (Appellant) and Juma Sulemani Massaro way back on 11th November, 2020 which was breached by the Appellant (Milan Alan Mgeni) for non-compliance of the terms and conditions stipulated in the said contract.

Moreover, he further contended that following the breach of the contract, as it was held in the first (1st) appellate Court there was no any proof of the specific performance of the said contract on the side of the Appellant. Basically, he emphasized that the Appellant did not prove all what he had incurred the claim. He cited with approval section 110 (1) of the Evidence Act (Cap. 6 Revised Edition 2019) which clearly stipulates that he who alleges any fact, must prove that such facts exist. He emphasized that the hereabove legal position was cemented in the case of **Barelia Karangi Rangi v. Asteria Myalwamba**, Civil Appeal No. 237 of 2017

(Cort of Appeal of Tanzania) (unreported). As a matter of fact, he further contended that there was a fundamental breach of contract by the Appellant and any other costs or expenses allegedly to have been incurred by the Appellant cannot be borne by the Respondent.

For more clarification, reference was made to the case of **Abdul Mohamed @ Madabo v. Republic**, Criminal Appeal No. 257 of 2022 which is distinguishable much as it is the criminal case whose standards of proof differs by far from civil Cases. Eventually, it has to be disregarded.

Furthermore, he contended that the Appellant questions of the jurisdiction of the Trial Primary Court on account that the forms used to institute the case are not the ones which have been approved by the law, he emphasized that the Trial Court before admitting the charge considered the following: *Firstly*, whether or not there is a proper cause of action. *Secondly*, whether or not the suit is time-barred; and *thirdly*, whether or not the suit is barred by any law. To put in a nutshell, he actually connected his arguments with the case of **Eunice Mashaija and Another v. Ansiberth Nkete**, Land Appeal No. 101 of 2020 (High Court at Bukoba). On the same note, he further contended that the issue of instituting the case by using "Hati ya Madai" instead of "Madai-2"

promulgated in Rule 15(1) of the *Magistrates Courts* (Approved Forms for the Primary Court) Rule, did not led to any occasion of miscarriage of Justice. Last but not least, he prayed that this appeal to be dismissed.

In that regard, in rejoinder submission the Appellants submitted by citing section 110(1) of the *Evidence Act* (Cap. 6, R.E. 2019) on proof of the repair of the house and the likes, it is contrary to the needs of the case which originated from primary Courts. To crown it all, he made reference to the case of **Haruna Chakupewa v. Patrick Christopher Ntakundo**, PC Civil Appeal No. 10 of 2021. He contended that since the matter affects the jurisdiction of the case at hand, it should not be taken lightly since the jurisdiction touches the whole proceedings of the case hence, the proceedings and findings are nullities.

Having gone through the petition of appeal, which encompasses three (03) grounds, I find that they boil down into two (02) issues namely:

- i. Firstly, whether the Appellant proved the claims to the required standards and what reliefs are the parties entitled to?
- ii. Secondly, what are the available remedies?

On the issue of whether the claims were proved to the required standards, I have perused the Trial Court's (Primary Court) records to check whether the Appellant really owes the Respondent the amount of twenty-four million (24,000,000) shillings. Sincerely, I have realized that there is an exhibit which is a contract for sale of a house exhibited as exhibit P1. In that contract the Appellant bought a house from the Respondent. They agreed that the house was to be bought at the cost of thirty million (30,000,000) shillings. The contract for sale of house was signed on 11th November, 2020 and it shows that the Appellant had paid four million (4,000,000) shillings. They agreed that on 18th November, 2020 the Appellant should have paid half of the cost of the sale and the house be handed to the Appellant for repair.

The Appellant was to pay the remaining amount of fifteen million (15,000,000/=) Tanzanian shillings by 30th June, 2021 and the house was to be handed to the Appellant. Exhibit P2 proves that the Appellant paid another instalment of one million (1,000,000/=) Tanzania shillings making the total amount of payment to be five million (5,000,000) Tanzanian shillings. Also, the Appellant claimed five million (5,000,000) Tanzanian shillings as costs of repair of the house. But he didn't have evidence to

prove how the repair was done. The Appellant also claimed that he put some properties in that house but he had no evidence to prove those allegations.

To crown it all, this is clearly shown in the evidence of the Appellant during the cross examination that the Respondent had said that he repaired the house on his own terms. In that case, the basic question here is whether the house passed from the buyer to the seller. Principally, I have analyzed the evidence and found that the Appellant had not yet settled payment of the entire contract. He actually paid five million (5,000,000) Tanzanian shillings only which was less than the contractual agreement. The Respondent decided to sell the house to another person since the Appellant breached the contract.

In fact, the first (1st) installment of four million (4,000,000) Tanzanian shillings and the second (2nd) installment of one million (1,000,000) Tanzanian shillings brought the total amount of money paid to be five million (5,000,000) Tanzanian shillings. So, it is clear that the legally known debt is five million (5,000,000) Tanzanian shillings as shown in the exhibit P1 and P2. The Appellant failed to prove his claim of twenty four million (24,000,000/=) Tanzanian shillings. He had no sufficient

evidence to prove that he owed that amount of money from the Respondent.

To put it in a nutshell and considering the issue of what are the available remedies. In the totality having properly evaluated the evidence on record, I proceed to allow this appeal partly on the ground that the Respondent must pay to the Appellant five million (5,000,000) Tanzanian shillings with costs. Order accordingly.

DATED and DELIVERED at SONGEA this 2nd day of February, 2023.

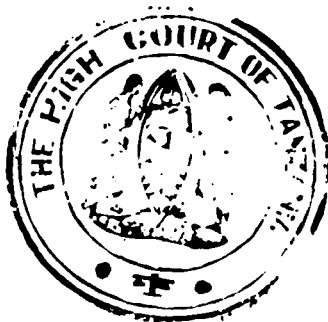



U. E. MADEHA

JUDGE

02/02/2023

COURT: This judgment is read before the Appellant and the Respondent and the right of appeal is explained to both parties.




U. E. MADEHA

JUDGE

02/02/2023