IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

PC. CIVIL APPEAL NO.45 OF 2022

(Arising from Civil Appeal No. 32 of 2021 District Court of Bukoba Originating from Civil Case No. 76 of 2021 Bukoba Urban Primary Court)

ABDULAHIMU RUGAENDA..... APPELANT

VERSUS

ODETHA T. RUGAMBWA..... RESPONDENT

JUDGMENT

24th February and 10th March, 2023

BANZI, J.:

This is a second appeal emanating from Bukoba Urban Primary Court where the Respondent, Odetha T. Rugambwa sued the Appellant, Abdulahimu Rugaenda claiming for payment of Tshs.3,620,000/= being the amount for value and rent of movable business cabin hired by the Appellant for office premises. The Respondent alleged to have entered into oral contract with the Appellant for payment of Tshs.45,000/= per month but the latter defaulted to pay for 36 months and he has refused to return the said cabin. On the other hand, the Appellant denied the alleged oral contract and the claim. At the end of the trial, the trial court decided in favour of the Respondent. Dissatisfied with such decision, the Appellant unsuccessfully

appealed to the District Court of Bukoba (the first appellate court). Still aggrieved, he preferred this appeal on five grounds as hereunder:

1. *That, both appellate and trial court erred in law and fact to disregard the testimony of SM4 which corroborated appellant's testimony that the said cabin was under the trust of TABOA an institution which the appellant was a mere supervisor;*
2. *That, having observed the picture of the respondent's cabin at the Bukoba Municipal office which is printed "OFISI YA TABOA KAGERA STENDI" both trial and 1st appellate court erred in law and fact to disregard the testimony of the appellant that the said cabin was leased to TABOA an entity capable of suing and being sued and that the testimony by SM5 that cabin was for the purpose of installing office supports version of the appellant that he was a mere supervisor;*
3. *That, both 1st appellate and trial court erred both in law and fact to hold that the testimony by the respondent had more weight than that of the appellant while the trial court presumed existence of oral contract of which its terms and consideration alleged by SM1 was not witnessed by either witness testified in court hence leaving the presumed oral contract to be tainted with uncertainty hence not enforceable.*
4. *That, both 1st appellate and trial court erred in fact and law to allow the claims by the respondent worthy of*

Tshs.3,620,000/= against the appellant while the respondent did not specifically prove that amount;

5. *That, during pendency of (PC) Civil Number 23 of 2022 in this High Court which was withdrawn with leave to re-file appellant obtained officially handing over official correspondences of the cabin in dispute between TABOA and Bukoba Municipal Council which for the ends of justice those correspondences are hereby annexed to this appeal as Annexture ORBA-1 Collectively for them to be taken as additional evidence in this appeal or for and order that those documents be taken and certified as additional evidence by the other court.*

Before hearing of the appeal, the Appellant filed Misc. Civil Application No. 11 of 2023 with a prayer for this Court to take additional evidence which was not in his possession during the trial or hearing of the first appeal. The Respondent did not oppose the application as a result, the same was granted.

When the appeal was called for hearing, the Appellant was represented by Mr. Projestus Mulokozi, learned counsel while the Respondent had the services of Mr. Victor Blasio, learned counsel. Before hearing commenced, and following the ruling in Misc. Civil Application No. 11 of 2023, this Court received additional evidence of the Appellant under the dictates of section 29 (a) of the Magistrates' Courts Act [Cap. 11 R.E. 2019] and rule 14 of the

Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN No. 312 of 1964. The said evidence was; letter dated 15/07/2022 with Ref No. BK/HCT-R23/2022/01 (Exhibit D1), letter dated 18/07/2022 with Ref No. KGR/BMC/T.20/8/VOL.IV/21 (Exhibit D2), letter dated 27/5/2022 with Ref No. KGR/BMC/T.20/8/VOL.IV/16 (Exhibit D3) and letter dated 24/5/2022 with Ref No. TABOA/KG/01/25 (Exhibit D4).

After receiving additional evidence, Mr. Mulokozi began his submission in support of the appeal by arguing the first and second grounds jointly. It was his submission that, the cabin in question was leased to TABOA and the Appellant was a mere clerk supervising the activities of TABOA, an association capable of being sued. Despite that fact, the trial court disregarded such evidence and held the Appellant responsible for the claim which was also upheld by the first appellate court. He urged the Court to find that it was TABOA who is responsible to pay the Respondent.

Concerning the third ground, Mr. Mulokozi submitted that, the trial court misdirected itself to conclude that, the evidence of the Respondent was heavier than that of the Appellant basing on oral contract between the Respondent and the Appellant for hiring of the cabin for the rent of Tshs.45,000/- per month without proof from any witness as required by law. According to him, even the witnesses who were brought before the Court,

did not state to have witnessed the parties entering into such contract. On the other way, he argued that, if there would be any contract, that contract was uncertain because it did not state when it commenced or the terms and the duration of the contract. Hence, it was void according to section 29 of the Law of Contract Act [Cap 345 R.E. 2019] ("the Law of Contract Act").

Reverting to the fourth ground, He stated that, the Respondent has failed to prove the claim of Tshs.2,000,000/= as the value of the cabin but the trial court ordered him to pay her Tshs.2,000,000/= being the value of the said cabin. He cited the case of **Masolele General Agencies v. African Inland Church of Tanzania** [1994] TLR 192 to support his submission on the requirement to prove specific claim. He concluded his submission, by praying for the appeal to be allowed by quashing all orders made by the trial court and the first appellate court.

In reply, Mr. Blasio submitted that, the trial court correctly found that, there was a contract of hiring the cabin between the Appellant and the Respondent basing on the evidence of SM1 and SM5. He added that, the evidence of SM4 about the Respondent to have hired the cabin to TABOA cannot be acted upon for being hearsay. He went on and submitted that, the allegations by the Appellant that he was just a supervisor under the control of TABOA was unfounded because the Appellant did not bring any

witness from TABOA to prove that he was executing the duties assigned to him by TABOA. He urged the Court to draw adverse inference against the Appellant because the witnesses from TABOA were material witnesses but the Appellant failed to produce them to court, who if would be called, would testify against him. He supported his submission with the case of **Hemed Hassan v. Mohmed Mbilu** [1984] T.L.R 113.

Returning to the third ground, he contended that, the evidence from the Respondent side was heavier than that of the Appellant which was supported by SM1 and SM5 who told the court that, there was oral a contract between them which commenced in February 2018. Also, SM2 and SM3 witnessed the Appellant taking the cabin. With regard to the fourth ground, he stated that, the Respondent filed a claim of Tshs.3,620,000/= being the value of the cabin and unpaid rent and the Appellant did not deny or cross-examine on it. Thus, the trial court correctly ordered the Appellant to pay Tshs.1,620,000/- and restitution of the cabin or pay its value. Finalising his submissions, learned counsel urged this Court to dismiss the appeal on the reason that there are concurrent findings of the two courts below and as a matter of principle, this Court cannot intervene their findings unless there is misapprehension of evidence something which is not the case in the matter at hand.

In a brief rejoinder, Mr. Mulokozi reiterated his submission in chief that there was no contract between the Appellant and the Respondent and there was no proof of oral contract between them. That the same was corroborated by the evidence of SM4. On the argument raised by Mr. Blasio that the court should draw adverse inference against the Appellant for not calling any witness from TABOA, Mr. Mulokozi was of the view that, there was no need to call that witness because the Appellant tendered the documents which clearly showed that TABOA was responsible with the lease and not the Appellant. He therefore prayed for the appeal to be allowed with costs.

Having examined the submissions by both parties and the petition of appeal it is clear that, the appeal at hand comprises of matters of facts and law. The principle on matters of fact on second appeal is well settled that, a court of second appeal will not routinely interfere with the findings of the two courts below except where there has been non-direction or a misapprehension of evidence causing injustice or violation of some principles of law or procedure. See the case of **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores v. A. H. Jariwalla t/a Zanzibar Hotel** [1980] TLR 31, **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Bomu Mohamedi v. Hamis**

Amiri, Civil Appeal No. 99 of 2018 CAT (unreported). It is also a settled principle that, where first appellate court fails to re-evaluate the evidence, the second appellate court may interfere the concurrent findings and re-evaluate the evidence and come out with its own findings. See the case of **Yohana Paulo v. Republic**, Criminal Appeal No. 281 of 2012 CAT (unreported).

Having examined the evidence on record and the decisions of two courts below, it is the considered view of this Court that, this is among the cases which calls for intervention of the second appellate court following misapprehension of evidence by the two courts below. In doing so, the main issue of controversy is whether there was any contract between the Appellant and the Respondent. Looking closely at the evidence on record, it is undisputed that, the Respondent did not tender any written contract to substantiate her claim of existence of contract between her and the Appellant. What is clearly shown is that, the Respondent stated that she was phoned by the Appellant who wanted to lease the cabin and they orally agreed for the Appellant to pay Tshs.45,000/= per month. However, according to her, the Appellant had never paid any rent for three years until the cabin was taken by Bukoba Municipal Council.

From that evidence, the Respondent contended to have entered into oral contract with the Appellant. Therefore, the next question to be determined is whether there was oral contract between the Appellant and the Respondent. Section 10 of the Law of Contract Act provides that:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void: Provided that, nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required to be made in writing or in electronic form or in the presence of witnesses, or any law relating to the registration of documents."*

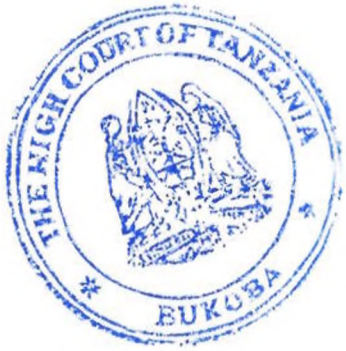
What I gathered from the provision of the law above is that, for oral contract to be valid and enforceable, it must be proved by witnesses who were present during the formation of that contract. In the case at hand, the Respondent did not tell the trial court the persons who witnessed the formation of that contract. For ease reference, I wish to quote what was said by the Respondent at the trial court;

"Nilipigiwa simu kuwa SU1 anaitaji kukodi kibanda changu atumie kama ofisi na tulikubaliana SU1 atatoa kibanda akipeleke stand kuu ya mabasi..."

Notably, the Respondent did not tell the court who phoned her and who were present when they formed the agreement in question. Besides, none among the witnesses that were summoned by the Respondent told the court to be present during the formation of the said oral contract. Also, no one told the court the amount they agreed to be paid to the Respondent or the terms and conditions of the said contract. What was testified and was not disputed is that the Appellant was the one who took the cabin to bus terminal, but they did not tell the court the amount agreed and the terms of that agreement. The fact that the Appellant was seen taking the cabin to bus terminal is not a conclusive proof of existence of oral contract between the Appellant and the Respondent. Thus, it goes without saying that, there was no proof that, the cabin was leased to the Appellant basing on oral contract. Considering the exhibits (D1, D2, D3 and D4) that were tendered during the hearing of additional evidence, and taking into account that the cabin was used as TABOA office in Kagera Region, it is clear that, if there was any contract, then it was TABOA who was responsible with the lease of that cabin and not the Appellant who was a mere employee of TABOA.

Due to the prevailing circumstances, it is clear that the Respondent did not prove the claim to the required standards. Therefore, I find the appeal with merit. Consequently, I allow the appeal by quashing the judgments and setting aside the decree and orders of the District Court and that of the Primary Court. I make no order as to costs.

It is so ordered.



I. K. BANZI
JUDGE
10/03/2023

Delivered this 10th day of March, 2021 in the presence of the Appellant and in the absence of the Respondent.

I. K. BANZI
JUDGE
10/03/2023