

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF KIGOMA
AT KIGOMA**

PC CIVIL APPEAL NO. 7 OF 2022

(Originating from Civil Appeal No. 10/2021 in the District court of Kasulu Before I.D. Batenzi, Original Civil Case No. 02/2021 of Muyama Primary Court before Hon. W.T. Kalyango - RM)

EDISONI ZEBEDAYO MAGURUAPPELLANT

VERSUS

JONASI ZEBEDAYO MAGURURESPONDENT

JUDGMENT

16/2/2023 & 29/3/2023

L.M. Mlacha,J.

The appellant, Edson Zebedayo Maguru, sent the respondent Jonasi Zebedayo Maguru at Muyama Primary Court in Civil Case No. 2/2021 claiming Tshs 6,200,000/= being the value of seven (7) heads of cattle and a bicycle. They are brothers from the same father and mother. Their father is not mentioned in the records, possibly he died some years back. Their mother, Ester Duwango is still alive and was active throughout. She testified at the primary court as PW3. She also appeared before me and repeated what she had told the primary court. She was bitter on what is happening to her children. There is no peace between the parties and the whole family is in a state of confusion because of this case. A dispute which could easily be

solved at the family or village level has crossed through the two lower courts without solution to this court.

It is a fact admitted that the appellant lives at Kahama where he works for gain. His brother, the respondent, and the rest of the family members live at the village but with different homesteads. The respondent lives a bit far. It was the appellant's case that, sometimes in February 2014, he returned home and developed an interest of buying cattle to be raised at the village as an investment. He moved around to look for one. The respondent who had cattle told him that it was not good to look for it elsewhere because he could sell him one. They discussed the matter on 9/2/2014 and agreed that the respondent could sell him a cow for Tshs 400,000/=. He came with his mother, PW3, Ester Duwango and his brother, PW2 Josephat Zebedayo on the next day to conclude the sale agreement. He paid Tshs. 400,000/= as purchase price for the cattle. Both PW2 and PW3 said that they witnessed the sale agreement, evidencing the cow being bought for Tshs 400,000/=.

The appellant demanded to take the cow home where he lives with his mother. The respondent resisted saying he could keep it for him because he needed to get some manure out of it. They agreed that it should be left with the respondent. Both PW2 and PW3 accept that it was left with him.

It was the evidence of the appellant that the respondent called him 4 times to witness that the cow had delivered calves, meaning that he had now 5 cattle with his brother. Both PW2 and PW3 accept this fact. Meanwhile somewhere in between, the appellant bought 2 other cows which he left with his mother. They delivered 2 calves, but for some reason, the cows died. The two calves remained at home. Faced with this challenge, he approached his brother, the respondent who agreed to receive the two calves. They remained with him and grew up. Both PW2 and PW3 said that the two cattle were shifted to the respondent for care. Two other witnesses from the family support this fact.

Now, sometimes in 2021, the appellant was in need of money and approached his brother, the respondent with the view of selling one head of cattle out of his 7 heads of cattle now with the respondent. The problem started at this stage. The respondent resisted and all efforts to solve the dispute at family level could not be successful hence the matter going to the court primary court in Civil Case No. 2/2021. The appellant appeared at the primary court to prove his case. He called several witnesses.

The respondent appeared at the primary court and denied to sell the cow to the appellant. He also denied to have any cow of the appellant which has

connection to the sold cow. He admitted to receive the two calves which grew up. He said that one of them delivered a calve adding that all of them died a fact which was communicated to the appellant. He had witnesses to support him. He denied to receive any bicycle from the appellant.

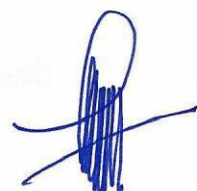
The trial magistrate believed the appellant and his witnesses. He was convinced that the appellant had proved his case on the balance of probabilities and award Tshs 6,200,000/= being the value of the 7 heads of cattle and the bicycle as prayed. On appeal to the district court in Civil Appeal No. 10 of 2021, Mushi SRM observed that the trial magistrate ought to have sought the assistance of experts to know the value of 7 heads of cattle before making the award. He ordered the recording of additional evidence to establish the value of the heads of cattle. Additional evidence was recorded and sent to the district court. It came up with the value of Tshs 2,700,000/=. Mushi SRM was transferred to another station. The file moved to I.D. Batenzi RM who allowed the appeal, saying that there was no evidence to prove the claim hence this appeal.

Aggrieved by the decision of I.D. Batenzi RM, the appellant has now come to this court by way of appeal. The grounds of appeal can be presented as under:

1. That, the district court erred in law and facts for failure to give weight to the oral evidence adduced by appellant and his Witnesses.
2. That, I.D. Batenzi erred in law for presiding over and delivering the judgment on a matter which was heard by another magistrate.
3. That, the district court erred in law for determining the matter based on new evidence (Evaluation report) which was not discussed by the trial court during the trial.
4. That the district court erred in law by awarding costs to the respondent.
5. That, the district court erred in quashing the decision of the primary court and ordering trial tried denovo.

The parties appeared in person. Hearing was done by oral submissions in the presence of the entire family which also included their mother. The submission of the appellant was brief. He said that he bought a cow from his brother which gave birth to 4 calves. They became 5. He added 2 heads of cattle later making a total of 7 heads of cattle which is his claim.

The respondent proceeded to deny to have sold the cow to the appellant. He said that the source of the matter is a land dispute. That, the appellant took the land, one acre which belonged to their sister and planted trees. He



resisted and the appellant brought the story of the cattle which is not correct. He could not tell the name of the sister or call him as his witness. His mother who was around rose up (off record) and put a finger to the respondent accusing him of speaking a lie. She repeated what she had said at the primary court that the respondent has the appellant's cattle which he must release.

I will now move to examine the grounds of appeal. Grounds one and five are closely connected and will be discussed together. They are based on the failure to evaluate the evidence of the lower court. That the appellate court failed to evaluate the evidence leading to a wrong finding of facts and decision. Having examined the evidence closely as I have tried to demonstrate above, I could not have any doubt that the appellant had heavier evidence than the respondent. Key among the witnesses was PW3, the mother of the parties. She said strongly that the respondent took the appellant's cow which gave birth 4 times. She added that he also took 2 more heads of cattle making a total of 7 heads of cattle. His brother (PW2) supported the story. There were two other witnesses from the family, PW4 Felister Chane and PW5 Ezekiel Nkenzidyo who supported the evidence. I think that they had no reason to lie against respondent. The respondent on

the other side brought his wife DW2 Zabelle Nigila and 2 other people, DW3 Majaliwa Iddi and DW4 Risahe Ruhie who are people from outside the family to support his story. The trial court which had the advantage of examining the credibility of witnesses did not believe the respondent and his witnesses. It believed the appellant and his witnesses.

The burden of proof in civil cases is on the balance of probabilities, that is the one who has heavier evidence must win the case. See **The Attorney General and 2 Others v. Eligi Edward Masawe and 104 Others**, Civil Appeal No. 86 of 2002, CAT, at Dar es salaam (unreported) Munuo, J.A. at page 7 & 8, **Akiba Commercial Bank Ltd v. Prisca Anyango Raya and Another**, Commercial Case No. 4 of 2005, HCT (Commercial Division) (unreported) Massati, J. (as he then was) and **Jaspa Abraham v. Rubeni Kafuku**, (HC-Bukoba), Land Case Appeal No. 27 of 2020 Mgetta, J. Looking at what was said by the appellant and his witnesses who are close relatives at the family and who included the mother of the parties, it is obvious that the appellant had heavier evidence than the respondent. In law the one who allege the existence of a fact must prove thier existence.

The appellant in this case, in my view had a heavier evidence than the respondent making grounds one and five meritious which are allowed.

Ground two is on change of magistrates. The appeal was heard by Mushi RM who on being transferred, shifted to Mr. I.D. Batenzi. In **MARY RICHARD MZINGULA V. R.**, Criminal Appeal No.153 "B" of 2011 CAT Tabora (Unreported) it was said thus:

*"In a number of cases decided by the court, the court has always emphasized that a trial case should be completed by the same magistrate. When for one reason or another a magistrate who started the trial fails to conduct the trial to its completion, **the reasons for his failure to do so must be given.** Where a successor magistrate takes over the trial of the case without reasons being given, the successor magistrate lacks jurisdiction."*(Emphasis added)

See also In **ABDI MASOUD @ IBOMA & 3 OTHERS V. R** Criminal Appeal No.116 Of 2015 Cat Dodoma (Unreported) and **PRISCUS KIMARO V R** CAT Criminal Appeal No. 301 of 2013 (Unreported).

In Priscus Kimaro (supra), the court said as follows:

*"...where it is necessary to reassign a partly heard matter to another magistrate, **the reasons for the failure of the first***

magistrate to complete must be recorded. If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons could just pick up any file and deal with it to the detriment of justice. This must not be allowed. (Emphasis added)

Reasons for change of venue were recorded on 18/11/2021 at page 10 making ground two baseless.

Ground three was on the use of additional evidence to determine the appeal. That is allowed under section 21 (a) of the Magistrates Courts Act cap 11 R.E.2019 where it is provided thus:

"21- In the exercise of its appellate jurisdiction, a district court shall have power-

- a) To direct the primary court to take additional evidence and certify the same to the district court..."

This is exactly what was done in this case making ground three baseless.

Ground four was on the order for costs. That the district court ordered payment of costs without justification and without taking into account that the appeal was decided on a technical issue of a valuation report. This

ground too is baseless because the practice of our courts is that costs follow the decision, that is, he who wins has a right for costs subject to the discretion of court. See **Itex Sarl v. Chief Executive Tanzania Road Agency (TANROADS) and another**, Civil Application no. 14 of 2015 (CAT), at page 4 where it was said as under:

*"However, the general rule and practice is that **costs should normally follow the event unless the Court orders otherwise** for good reason, which must be based on facts."* (Emphasis added)

See also Shaban Fundi v. Leonard Clement, (CAT), Civil Appeal No. 38 of 2011 page 6-7 where it was said as under:

*"In this jurisdiction and perhaps elsewhere in the Commonwealth and the world at large, it is elementary law in civil litigation that **costs must follow the event**. That is to say, unless there are strong reasons to the contrary, a successful party in civil litigation must have its costs."* (Emphasis added)

The district court did not error in ordering payment of costs in the circumstance of the case.

Based on the finding of the court on ground one and five this appeal must be allowed but I think there is need of examining the matter further. The appellant claimed Tshs 6,200,000/= being the value of 7 heads of cattle and a bicycle. On the direction of the district court, the primary court recorded addition evidence of the agricultural officer which was legal under the law. The livestock and agricultural officer fixed the value of the heads of cattle at Tshs 2,700,000/=. This finding in part of the evidence on record. It has the effect of reducing the value of the heads of cattle from Tshs 6,000,000/= to Tshs 2,700,000/=. This should now be the value of the heads of cattle. I could not see any evidence of the existence of the bicycle. I will thus find and hold that the appellant will be entitled to value of the heads of cattle Tshs 2,700,000/= less an allowance for keeping the cattle, which I assess and I fix at Tshs 700,000/=. That means that, the appellant should be paid Tshs 2,000,000/= only. I order so.

The appeal is partly allowed. It is ordered so. No order for costs.


L.M. Mlacha

Judge

29/3/2023



Court: Judgment delivered in the presence of the parties. Right of Appeal Explained.



A handwritten signature in blue ink, appearing to be "L.M. Mlacha", is written over a horizontal line.

L.M. Mlacha

Judge

29/3/2023

ORIGINAL