

**IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY
AT MUSOMA
CIVIL APPEAL NO. 28 OF 2023**

(Originated from Civil Case No. 4 of 2021 at Tarime District Court)

HENRY MWIKWABE MAGEREAPPELLANT

VERSUS

JULIUS SIMON CHACHA..... 1st RESPONDENT

OLIVIA A. M. KIGINGA 2nd RESPONDENT

SIBITARI MTATIRO 3rd RESPONDENT

JUDGMENT

23rd & 25th May, 2023

M. L. KOMBA, J.:

A dispute arose after execution of Kyang'ombe Ward Tribunal (the tribunal) order in **civil case No. 69 of 2019** between the 3rd Respondent and Juliana Wankyo Magere where the Tribunal ordered attachment of money Tsh 416,956/ or two cows from the homestead of Juliana Wankyo Magere. Attachment was done by the all respondent herein; 1 and 2 were Ward Executive Officer and Village executive Officers while the 3 respondent was the decree holder.

Appellant, by a letter, objected attachment of said cows claiming to belong to him but the Tribunal proceeded and he decided to file Civil Case No. 4 of

2021 at Tarime District Court (trial Court) claiming that defendants jointly and maliciously attached two cows from the plaintiff, home in execution of the Tribunals award against Juliana Wankyo Magere whereas the plaintiff was not party and claim against respondents actual value of two cows Tsh 1,000,000/, compensation for disturbance 700,000/, compensation for malicious act to the tune of 9,000,000/ and costs of the case. Respondents who were defendants claimed that the said cow was attached in honour of the Tribunal order in **civil case No. 69 of 2019**. As it were, at the end of the trial, the trial court made a finding that the prosecution failed to prove case against defendants.

He has therefore; approached this Court through the instant appeal to challenge the decision of the trial court which dismissed his case. petition of appeal lodged by the appellant before this Court earlier on contains four grounds of appeal, as follows:

1. **That**, the averments and contents in paragraph 1 of the memorandum of appeal by the appellant are strongly disputed; and the respondents states that the decision of the trial court is worthy and correctly reached after due consideration and evaluation of the evidence adduced by both parties

2. **That,** the contents in paragraph 2 and 3 of the memorandum of appeal by the appellant are strongly disputed and the Appellant is put to strict proof thereto. Further the respondents avers that, after the 3rd respondent approached the hamlet chairman to report the issue, they came to realize that the cow belongs to the Juliana Wankyo Magere and she came after it.
3. **That,** the contents in paragraph 4 of the memorandum of appeal by the appellant are strongly disputed and the appellant is put to strict proof thereto. The Respondents further states that the evidence adduced by the appellant in respect of the ownership of the alleged cow were not sufficient for the court to rely on it.

At the hearing of this appeal, the applicant enjoyed the service of Mr. Thomas Manyama Makongo, learned counsel while the respondent stand solo, unrepresented. When called upon to expound on his grounds of appeal, the appellant through his advocate decided to combine the 1st and 4th ground and argue them together and then the rest of the grounds (2 and 3) will be joined too.

He submitted that the trial court did not evaluate evidence properly against the specifically where the court said the seized cows were not confirmed to

be his properties and by saying he failed to call Juliana Wankyo as witness. In his elaboration he said, the appellant had 2 witness who testified that the cows belonged to him, that is appellant himself who was PW1 and PW2 (Melania William Magere who is the appellant's sister). It was his submission that PW2 informed the court that the seized cows was the properties of the appellant Wankyo has no cow neither chicken. The same was collaborated by the testimony of Wankyo while at the Tribunal when she informed the tribunal that. *'Mzee Sibitali ananionea kwa sababu alinifikisha kwa Mwenyekiti. Mwenye ng'ombe sio mimi ila ni Mwikwabi Magere.'* He said basing on this testimony the cows was not owned by Wankyo and there was no need of calling wankyo as witness.

The counsel referred this court to the case of **Mbecad's Nyanjige vs. Chaphole Co. Ltd**, Land Appeal No. 6/2010 HC Mwanza where Judge analyzed Order 1 Rule 10 (2) that the court has a role to order a party to be joined in a case. And relied on Order 1 Rule 9 that no suit shall be defeated for nonjoinder but the matter should be dealt to its finality. He concluded that the evidence of PW2 was enough and that Hon. Magistrate did not weigh and analyze the evidence properly.

On the last two joined grounds which are 2 and 3 he was of the submission that the attached properties did not belong to Wankyo but it was the properties of Magere and even the 3rd respondent in this appeal who led the attachment did not know that cows belongs to the appellant as seen in the Ward Tribunal Judgment (civil case No.69 of 2019) at 2nd page that he was informed by Musa that cows are from the Magere compound. He contended that the same position was confirmed by respondent in that application (Wankyo) where she said cows belongs of Mwikwabe Magere although the Tribunal decided otherwise and the 3rd respondent benefited from that attachment. It is his submission that decision in Civil Case No. 4 of 2021 was not fair as Magistrate failed to analyze evidence before him. The counsel prayed that the decision to be nullified, appeal to be found with merit and be granted what appellant prayed in trial court in Civil Case No. 4 of 2021. He prayed for costs too.

In handling this appeal I had time to peruse the record of the previous courts over the subject matter and petition of appeal together with reply to the petition. In considering directives of the Court of Appeal in **Firmon Mlowe vs. The Republic**, Criminal Appeal No. 504 of 2020 Court of Appeal at Iringa (Unreported) where it was directed that the court is at liberty to address the

grounds separately or generally or the decisive one only, it must specifically indicate so in the judgment. In the appeal at hand, I will generalize ground of appeal in order to determine whether the appellant proved his case to the required standard.

Among the complain of the appellant is analysis of the evidence done by the trial court and non joinder of party who is Wankyo. This being the first appeal, the principle in **The Registered Trustees of Joy in The Harvest vs. Hamza K. Sungura**, Civil Appeal No. 149 Of 2017, CAT at Tabora (Unreported) is that, this court can re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision. In doing so I will combine all ground in proving whether the appellant managed to prove his case on balance of probability.

One of the important principles as in section 3 of the Evidence Act is on preponderance of probability and that the duty of proving allegation is vested to the one who alleges as in section 110 of the Evidence Act.

Reading exhibit D2 at page 2 (of hand written proceeding) When the cows was found destroying crops, it was said that cow was from '*kwa Magere*' and then one family member from Magere compound (Juliana Wankyo Magere)

took that cow who was found destroying crops. There is a difference between the cow 'belong to Magere' and 'from Magere compound' to mean "ng'ombe wa Magere" na "ng'ombe wa kwa Magere" ni vitu tofauti.

It is from record that Juliana Wankyo Magere took the cow and sends it home without hesitation, the cows which was said it destroyed crops. That shows she was the one responsible over that cows, contrary to that she was supposed to left the cows to the Mtaa leader for further administration steps. The issue now is compensation over the destruction done by the said cows.

In law there is one doctrine called the doctrine of estoppel. In our country the doctrine is molded in the Evidence Act, [Cap 6 R. E. 2019] at section 123 thus;

'123. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.'

The doctrine entails that, once a person do something and made others to believe what he has done he cannot later on deny his action. The action of Juliana Wankyo Magere to take the said cows after it destroyed crops and

send it to her home, makes people to believe the cow was hers and therefore the claim for compensation which resulted to attachment of Juliana cows was correct.

I don't see the need to fault the trial Magistrate when she said necessary party was joined, Wankyo was supposed to be party of suit, defendant in trial in order for her to explain under what capacity she received a cow which was found destroying crops in negation of what is said by the appellant. From the cited provision of law, whom exactly is the owner of the cow is not proved to the balance of probability and therefore I not faulting the trial Magistrate.

In the circumstance, I find the appeal to be devoid of merit and is hereby dismissed with costs.

Dated in ~~MUSOMA~~ this 25th Day of May, 2023



NK
M. L. KOMBA

Judge

Judgement Delivered on this 25th day of May 2023 in chamber in the presence of both parties.

NK
M. L. KOMBA

Judge