

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 29 OF 2022

(Arising from Civil Appeal No.95 of 2021 delivered by Kinondoni District Court, Originated from Civil Case No.22 of 2021 delivered at Magomeni Primary Court)

HARUNA ISSA BAYARIS APPELLANT

VERSUS

SHAMTE BAKARI MBONDE.....RESPONDENT

JUDGMENT

20th April & 16th June, 2023

MKWIZU, J.

This is the second appeal. The appellant successfully instituted a civil suit before Magomeni Primary Court against the Respondent's claim for payment of a 3,789,000 principal loan advanced to the respondents, 14500,000 interest calculated at an agreed rate of 25%, and 3000,000 costs of the case. The claim was decided in the appellant's favour by allowing the amount of 8750,000 as the principal loan and interest.

Discontented, the respondent filed an appeal to the District Court of Kinondoni. The appeal could not yield any positive result. It is revealed from the district Court decision that all exhibits allegedly tendered at the trial court were missing from the trial court's records, and the 1st appellate court was of the view that there could be no meaningful decision without the said exhibits. He resorted to ordering a trial *denovo*.

The appellant (respondent at the district court) is not comfortable with the retrial order. He has preferred this appeal on five (5) grounds:

1. That the 1st appellate Court erred in law and fact by failing to compel the trial court to hand over the exhibits received during the hearing of Civil Case No 22 of 2021, as the ordered retrial was so done without considering that the retrial needs the tendering of original record which was surrendered to the trial court and was not returned.
2. That, the 1st appellate Court erred in law and fact to order retrial denovo of Civil Case No. 22 of 2021 based on the trial court negligence as the original record is not available based on the trial court negligence.
3. That the 1st appellate court erred in law and fact by ordering such retrial based on court negligence without citing any provision of law or case law allowing such practice.
4. That the trial court erred in law and fact by failing to consider that the right delayed is equal to the right denied.
5. That the 1st appellate court erred in law and fact by failing to return the file to the in charge for an administrative procedure prior to resorting to quash the proceeding, causing unnecessary cost to the appellant without any legal justification for non-referring it to administrative of the 1st appellate court for opinion or directives.

The appeal was disposed of through written submissions. And both parties who are in person filed their respective written submissions as scheduled.

The appellant's argument in grounds 1,2,3 is that the 1st appellate court was not justified when it ordered the retrial of the suit without considering

that the appellant's suit will need to be supported by exhibits that were left in court during the original trial and which are currently missing without an order allowing the use of secondary evidence. To him, the appropriate remedy under the circumstances of the case would have been the reconstruction of the records. He cemented his submission by citing the case of **Robert S/O Madololyo Vs Republic, Criminal Appeal No. 486 OF 2015**, (unreported) where the court adjourned the hearing of the appeal for the Registrar of the High Court to reconstruct the record of appeal for the interest of justice.

In ground 4th the Appellant says an order for trial *denovo* is time-consuming, costs, and as stated in the preceding ground would need original exhibits which are no longer available. He urged the court to order the Magistrate in charge, Kinondoni District Court who has the supervisory powers over Magomeni Primary Court to take necessary steps for the reconstruction of the record for the purpose of determining Civil Appeal No. 95 of 2021 on merits.

In his reply, the Respondent argued that the appellant's grounds of appeal are devoid of merit and the same should be dismissed with cost. His contention was that the admission of evidence at the lower court is governed by laws and therefore the appellate court cannot direct such courts on the manner of conducting the proceedings. He was of the view that the trial *denovo* order by the 1st appellant court is correct under the circumstances of this case. Distinguishing the decision **Robert S/o Madololyo vs Republic** with the case at hand, the respondent counsel stated that this case is about the missing exhibits, while the issue on the cited case was on the records of appeal. He invited the court to take the

principles set in the case of **Amratlal D.M t/a Zanzibar silk stores Versus A.H Jariwara t/a Zanzibar hotel** (1980) TLR 21. It was held that.

"The Court cannot interfere with an appeal unless it is shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of a principle of law or practice".

To him, the retrial order is more prejudicial to him than the appellant who is, by the re-trial order given a second chance and an opportunity to be heard afresh and tender his documents. He contested ground 4 for being misconceived. He lastly prayed for the dismissal of the appeal with costs.

I have significantly gone through the grounds of appeal by the appellant and written submission by both parties. The only issue here is whether the trial de-novo order issued by the 1st appellant court is defensible. Having considered the issue in controversy, the 1st appellate court reasoned that examination of the exhibits tendered before the trial court was necessary for a right decision on the matter, however, the original documents could not be traced from the original records and the trial court despite his effort to request for the said exhibits. Hence a retrial order complained above which is viewed by the appellant as a waste of time, a justice delaying technic and it should have been coupled with an order authorizing the use of secondary evidence during the said re-trial after the original documents have gone missing from the court's records.

I have examined the records both by the 1st appellate court and that of the Trial, the primary court in relation to the impugned decision. I totally

do not find merit in this appeal. The information in the records reveals more errors than what was considered by the 1st appellate court. According to the records, SM1 had tendered three sets of documents. Two documents while testifying in court on 9/3/2021 and other additional documents after the SM2's evidence on 15/3/2021. On pages 3 and 4 of the typed proceedings, for instance, SM1 has intimated to tender the two documents (exhibit P1 and P2) mentioned by the 1st appellate court but neither of them was admitted in evidence by the trial court. The proceedings read:

"USHAHIDI UPANDE WA SM1 UNAANZA KUSIKILIZWA

Sm1, Haruna Issa, 49, mtumishi Sukuma Kongowe, Islam ameapishwa

- *Hawa SU1 na SU2 ni rafiki zangu niliwahi kuwapatia fedha ya kwenda kusilimu.*
- *Mnamo tarehe 06/07/2018 SU1 na SU2 walikuja kwangu wakitaka kukopa fedha shilling million 6.*
- *Mimi niliwakopesha kiasi cha shilingi milioni 3 na tukaandikishiana mkataba na fedha nyingine niliwatumia kupitia simu na jumla ni kiasi cha Tshs 3,789,000/-*
- *Naomba kuwasilisha kielelezo cha mkataba wetu naomba kuchukuliwa kwa sehemu ya ushahidi Exhibit P1.*
- *SU1 na SU2 waliweka dhamana yao ya nyumba kupitia mkataba wetu.*
- *Shati la pili wakishindwa kulipa fedha zangu watalipa 25% ya riba.*
- *2020 niliwaandikia notice ya kulipa deni langu lakini hawakulipa*

- *2021 nilitaka kuuza dhamana yao.*
- *SU1 baada ya hapo alianza kunichafua kazini kwangu na pana kielelezo hicho naomba kuwasilisha Exhibit P2.*
- *Ninachoomba nipate fedha zangu na gharama zangu 25% ambazo ni Tshs 14 million fidia pamoja na gharama za kiasi cha Tshs 700,000/- kama wakishindwa basi niuze dhamana yao ambayo ni nyumba. Naomba kuwasilisha vielelezo vyangu.*
- *Naomba mahakama imtake SU1 kunilipa Tshs 18 milion anikabidhi nyumba aliyoweka dhamana katika mkataba awetu na ho ndio ushahidi wangu.*

I.K.S

T.E. Yairo - Hakim

9/3/2021"

No admission of the documents was made by the trial court. SM1 was then cross-examined by the SU1 and SU2 followed by the evidence by SM2 and cross-examination as usual. Thereafter SM1 was then recorded to have said: -

"SM 1

Naomba kukabidhi vielelezo vyangu vingine, SM na vichukuliwe kwa sehemu ya ushahidi katika kesi hii Exhibit "P" naomba kufunga ushahidi."

The proceeding on this date was followed by an order of admission SM1 exhibits as follows :

"MAHAKAMA:

Baada ya SU1 kukabidhi vielelezo vyao namahakama kuwapa nafasi SU1 kuhisi ili vipokelewe na kuvipa alama Exhibit P1 katika shauri hili.

I.K.S

T.E. Yairo - Hakim

15/03/2021"

There is no indication if the first two documents tendered by the complainant (SM1) were included in this admission or not. And in any case, the admissions order on 15/3/2021 was also arbitrarily done without disclosure of the document's identity including the types of documents admitted. Though it is true that the primary court's rules do not require strict adherence to the rules of evidence, I think that cannot go to allowing indistinctness in the proceedings. Clarity of what was being tendered and whether admitted in court or not was necessary so as to bring certainty and justice to the court's findings.

And, even if I am to agree with the appellant's complaints, the question would be what kind of evidence the court should order a reconstruction. What kind of exhibit P1 and P2 parties would bring to court for it to give a justified decision? And even if we assume that all tendered documents were admitted in court through its order dated 15/3/2021, still there will be a problem firstly because that order referees to exhibit P1 only. There is nothing like exhibit P2 admitted by the trial court.

Secondly, the last set of documents was admitted after the complainant had already testified both in chief and cross-examination contrary to Rule 11(2) of the Magistrate Courts (Rule of Evidence in Primary Courts)

Regulations GN No 22 of 1964 which requires oral evidence to be given to connect the documentary evidence produced with the case. This is not a minor confusion.

Things would have been at least easy if all the original documents brought to the trial court's attention were available on the court's records for the court's scrutiny. As stated above, the documents complained about are not within the court record for scrutiny. It is on record that the trial court's decision was rendered on 17/5/2021, the respondent herein wrote a letter requesting exhibits in the court records. His letter partly read:

"Kwa barua hii naomba Mahakama yako tukufu iweze kunipatia nakala ya baadhi ya vielelezo vilivyopo katika file la kesi kama ifuatavyo

1.Nakala ya mikataba

2.Nakala ya Tathmini ya Nyumba

3.Nakala ya Kitambulisho cha Mkurugenzi wa One 2 One Focus."

Though the above letter was written on 21/5/2021 four days after the delivery of the judgment, the magistrate endorsement on the same letter was made on 17/5/2021 with the following directives: "***zitolewe copies apatiwe***" and the records remained silent on what transpired thereafter.

There is no gainsaying that the trial court's records are a total nullity to be corrected by reconstruction of the records as suggested by the appellant. I have the advantage of reading the decision of **Robert S/O Madololyo Vs Republic (Supra)** cited by the appellant. Indeed, that decision is distinguishable, in that case, the entire records of proceedings

of the trial District Court and those of the High Court were missing from the record of appeal which is not the case here. As shown above, the proceedings themselves are crippled to be left alive by this court. The only appropriate remedy under the circumstances of this case, in my view, is a retrial as ordered by the 1st appellate court.

The appellant feels that since the original documents tendered in court are missing, then the court should authorize the use of secondary evidence during the retrial. I hesitated to buy that idea because even the trial court proceeding is silent about the type of documents (if any) admitted. And in any case, the Magistrate Courts (Rule of Evidence in Primary Courts) Regulations will guide the retrial proceedings.

Having found as above, I see no reason to depart from the 1st appellate courts' findings. The appeal is thus dismissed with an order remitting the file back to the trial court for a retrial before another magistrate. Since pointed errors were committed by the court, I will order each party to bear its own costs. Order accordingly

DATED at DAR ES SALAAM this 16th day of JUNE 2023.



**E.Y MKWIZU
JUDGE
16/6/2023**

