

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

PC CIVIL APPEAL NO. 11 OF 2022

*(Arising from the decision of District Court of Bunda in Civil Appeal No. 10
of 2021)*

BETWEEN

SAMO JULIUS 1ST APPELLANT

ENOCK MWIKWABI 2ND APPELLANT

VERSUS

PETER WEREMA..... RESPONDENT

JUDGMENT

A.A. MBAGWA, J.

This is a second appeal arising from the decision of the District Court of Bunda (Hon. B.C. SOKANYA RM). The matter originally started in the Primary Court of Bunda where the respondent Peter Werema sued the appellants Samo Julius, Enock Mwikwabi and Benjamini Maroti who is not a party to this appeal.

The respondent, Peter Werema instituted a suit, Civil Case No. 2 of 2021 against the appellants and another Benjamini Maroti in the Primary Court of Bunda. The respondent was claiming a sum of Tanzania shillings Five Hundred Eighty-Five Thousand (TZS 585,000/=) only being compensation for destruction caused to his rice farm.

In support of his claims, the respondent paraded three witnesses namely, Peter Werema (PW1), Gabriel Mwita Marwa (PW2), street chairman and Emmanuel Malenga Mazige, the agricultural officer. Besides, the respondent produced three exhibits to wit, a letter which was used to hand over the cattle (exhibit P1), a letter addressed to the agricultural officer to assess the destruction (exhibit P2) and valuation report (exhibit P3).

PW1 testified that on 27th March, 2021 around 16:00hrs he went to his rice farm which is located at Sengerema area within Mcharo Ward in the township of Bunda. On arriving he found the cattle therein. According to him the cattle had massively destructed rice crops while their herdsman were not there. As such, he called the street chairman one Gabriel Mwita Marwa (PW2) who shortly arrived at the locus in quo. Soon thereafter, the herdsman emerged. PW1 and PW2 tried to call the owners of cattle for negotiations to no avail. Consequently, they decided to handle the cattle to the herdsman in writing.

PW2 tendered the handing over document which was admitted and marked exhibit P1.

Later on, the complainant (PW1) was issued a letter by the Street Executive Officer which he submitted to the agricultural officer for purposes of assessing the damage caused. As such, on 1st April, 2021, Emmanuel Malenga Mazige (PW3) visited the locus in quo and assessed the destruction caused. Finally, he was opined that the destruction was worth TZS 585,000/= . PW5 tendered a letter to the Street Executive Officer which requested him to conduct evaluation of the damage and the assessment report and the same were admitted and marked exhibits P2 and P3 respectively.

PW1 and PW2 told the court that the cattle which were found in the complainant's farm were 43 and they belonged to the defendants (appellants). They elaborated that they identified the cattle to be the properties of the appellants through their marks and herdsmen.

In defence, only Benjamini Maroti and Enock Gasaya defended their case as Samo Julius (1st appellant) did not appear before the trial court despite of being duly served with the court summons. As such, the case proceeded

ex parte against him (Samo Julius). In essence, the appellants denied the complainant's claims. They told the trial court that the cattle which were allegedly found in the complainant's farm do not belong to them.

Upon conclusion of hearing, the trial court was satisfied that the complainant successfully established his case to the required standard. It thus entered judgment against the appellants. Consequently, the appellants were ordered to pay the complainant (respondent) a sum of Tanzania Shillings Five Hundred Eighty-Five Thousand (Tshs 585,000/=) being compensation for crop destruction. The trial court also ordered the appellants to pay costs of the case to a tune of Tanzania Shillings Five Thousand.

Aggrieved with the trial court's findings, the appellants appealed to the District Court of Bunda in Civil Appeal No. 10 of 2021 but their appeal was dismissed with costs for want merits.

Still undaunted, the appellants have knocked the doors of this court armed with the following grounds of appeal.

- 1. That, the first appellate court erred in law and fact by holding that the question of ownership of cattle cannot hold water for being a new*

ground raised on appeal and therefore ignored to consider and determine the same.

- 2. That, the first appellate court erred in law and fact by failing to take into consideration that the second appellant was present during the hearing of the suit at the trial court and hence he was entitled to be accorded the right to cross examine/ask question in respect of the contents of the documents/ exhibits tendered in court.*
- 3. That the first appellate court erred in law by failing to take into consideration that all the trial court's proceedings are a nullity as the trial court proceeded with ex parte hearing against the 1st appellant.*
- 4. That the District Court being the first appellate court erred in law and fact by failing to critically and properly analyse the watertight evidence adduced by the 2nd appellant.*

When the appeal was called on for hearing, Mr. Emmanuel Paul Mng'arwe, learned counsel appeared for the appellants whereas the respondent stood in person, unrepresented.

The learned counsel abandoned the 3rd ground and submitted on the rest.

Submitting on the 1st ground, the counsel argued that the District Court erred to hold that the ownership of cattle was not in dispute. He explained that the ownership of the cattle in dispute was denied by the appellants during trial. He concluded that the District Court therefore erred to say that the ownership of cattle was not in issue. He strongly opined that the first appellate court ought to consider and adjudicate on it instead of ignoring.

On the 2nd ground, the appellant's counsel submitted that the District Court erred to hold that there was no need for the exhibits to be read out to the appellants. He expounded that at page 3 of the judgment, the Hon. Appellate Magistrate held that the 1st appellant waived his right by not appearing in court but the 2nd respondent was present in court and was denied the right to cross examine. The counsel continued that the Appellate Magistrate admitted that exhibits P1, 2 and 3 were not read out but yet he proceeded to hold that it was not fatal for the 1st appellant was not present. He thus prayed the court to find this an error and therefore expunge the exhibits from the record. He concluded that once the exhibits are expunged, there remains no evidence to support the compensation that the appellants were ordered to pay.

Regarding the 4th ground, it was the counsel's submission that the District Court did not discharge its duty of evaluating the evidence adduced in the Primary Court hence arrived at a wrong decision. The appellant's counsel told this court that the evidence adduced by the appellants was weightier than the respondent's evidence. He argued that the respondent did not prove that the alleged cattle were owned by the appellants. The counsel argued that the respondent testified that it is the herdsmen who confessed that the cattle were owned by the appellants but the said herdsmen were not called to testify. The appellant's counsel also pointed out that the appellants clearly testified that their cattle were at home at the time which is alleged that they were in the respondent's farm.

In fine, the appellant's counsel prayed that this appeal be allowed, the two lower courts decisions be set aside and the respondent be ordered to pay cost of this appeal.

In rebuttal, the respondent, being a layperson did not have much to submit. He told the court that on the fateful day, he called the appellants to come to his farm to see the extent of destruction but they refused. He stated that, he decided to call the village chairman and agriculture officer who came and witnessed the destruction. He prayed that this appeal be dismissed.

I have had an occasion to navigate through the record of appeal and the submissions by the parties.

To start with the 1st ground on ownership of the cattle. PW1 and PW2, the village/street chairman testified that the cattle which were found in the respondent's farm belonged to the appellants. They said that they identified them by marks and through their herdsmen as they were known to them. There is also exhibit P1 in which the herdsmen signed indicating that the cattle were the properties of the appellants. PW2 told the trial court that after impounding the cattle, they called the owners (appellants) but they refused to come to the locus in quo. Also, Enock Gasaya (2nd appellant) while testifying, admitted that his wife was called. Having canvassed the evidence as a whole, I am satisfied that the respondent managed to establish, on balance of probabilities, ownership of the cattle which destroyed the respondent's farm that they belonged to the appellants.

The appellant's counsel also complained that the 2nd appellant was denied the right to cross examine. In the trial court proceedings, the 2nd appellant (ENOCK MWIKWABI) was being referred to as '**Mdai 3**'. On revisiting the record, I have found this complaint baseless. This is because throughout the

trial, all the defendants were being given opportunity to cross examine the witnesses and actually the 2nd respondent exercised his right

Regarding the complaints in the second ground that the exhibits were not read out, I have perused the handwritten proceedings in the trial court. On the proceedings dated 20th May, 2021, while admitting in evidence a handing over letter through PW2 Gabriel Mwita Marwa, the court remarked as follows;

'Mahakama: imepokea barua kielelezo kama 'P1' baada ya kusomwa na hakuna pingamizi'

Further, during admission of the letter requesting the agricultural officer to evaluate the extent of damage and evaluation report, the trial court remarked as follows;

'Mahakama: Kielelezo cha barua kutoka kwa mtendaji kimepokelewa na kutambuliwa kama 'P2' Pamoja na tathmini ikiwa 'P3' na baada ya kusomwa hakuna pingamizi'

Thus, from the authentic handwritten proceedings of the trial court, it is clear that all the three exhibits were read out in court after their admission. Had the counsel prayed to peruse the court file, he would have raised this ground of appeal. I therefore dismiss the second ground for being baseless.

In the 4th ground, the appellants complained that the first appellate court failed to analyse the 2nd appellant's evidence thereby arriving at a wrong conclusion. I have considered this ground vis a vis the evidence on record but I could not see the reason to fault the first appellate court. Upon holistic appraisal of the evidence, the respondent's evidence remains stronger than the appellant's evidence. It is the law that in civil cases, the standard of proof is on balance of probabilities that is to say, the court always relies on evidence which is more credible than the other. See **M & Food Processor Company Limited vs CRDB Bank Limited and 2 Others**, Civil Appeal No. 273 of 2020, CAT at Dar es Salaam. Both lower courts found that the cattle which caused destruction are the properties of the appellants. It is the law that this being the second appellate court is not entitled to interfere with the concurrent findings on issue unless there had been a misapprehension of the evidence or a violation of some principle of law. See **Peter vs. Sunday Post Ltd** [1958] E. A. 424, **Jafari Mohamed vs Republic**, Criminal Appeal No. 112 of 2006, CAT at Dodoma and **the Registered Trustees of Joy in the Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017, CAT at Tabora. Through my reading of the record, I did not come across any misapprehension of evidence or violation of principle of law

committed by the trial courts. Thus, I do not see a reason to depart from the concurrent findings of the two lower courts.

All the above considered, it is my unfeigned findings that this appeal is without merits. As such, I hereby dismiss it with costs.

It is so ordered.

Right of appeal is explained.




A. A. Mbagwa

JUDGE

08/06/2023