

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

**PC CIVIL APPEAL NO. 25 OF 2022**

*(Originating from Civil Appeal No. 61 of 2021 from Bariadi District Court  
and Civil Case No. 68 of 2021 from Somanda Primary Court)*

**ISSAH JOSEPH..... APPELLANT**

**VERSUS**

**MALONGO LUKANGO.....RESPONDENT**

**JUDGMENT**

*14<sup>th</sup> February & 23<sup>rd</sup> June 2023*

**MASSAM, J:**

Being aggrieved with both decisions of Somanda Primary Court and Bariadi District Court appealed to this court armed with the following grounds:

- 1. That, the trial court erred in law and fact by relying on a purchasing agreement of Plot No. 433 Kitalu "A" SIMA which was not tasted, tendered, and admitted in evidence as an exhibit to prove the claim of Tshs. 8,000,000/=.*

- 2. That, the trial court erred in law and fact by holding in favour of the respondent who failed to call an eyewitness.*
- 3. That, the trial court erred in law and fact by holding in favour of the respondent who failed to prove his case on the balance of probabilities.*
- 4. That, the trial court erred in fact and law by admitting exhibit M Contrary to the requirement of the law.*

Briefly, the facts of the case is that; the respondent filed a case against the appellant at Somanda Primary Court claiming Tshs. 8,000,000/= alleging that he bought the Land from the appellant Plot No. 433 Kitalu "A" at Bariadi which later on he found belonged to another person. On his, side the appellant denied the sale of a plot to the respondents herein and that an agreement tendered before this court he signed by force thinking it was prohibited for the cow to enter into his plot. Having heard both parties, the trial court was satisfied that the respondent proved her claim, and the appellant was ordered to pay Tshs. 8,000,000/= and the costs of the case.

Being dissatisfied the appellant unsuccessfully appealed to the Bariadi District Court where the decision of the trial court was upheld, hence, the present appeal.

During the hearing of this appeal, both the appellant and respondent appeared in person, unrepresented. Hearing of appeal was by way of written submissions and parties complied with the submissions schedule.

Submitting in support of the appeal, on the first ground of appeal the appellant submitted that any agreement entered between the parties regarding the surveyed plot must be in writing and not orally. Therefore Plot No. 433 Kitalu "A" is a surveyed land thus, it must be purchased by written agreement. Thus, it was his submission that the respondent failed to prove his case on the balance of probabilities. He referred this court to the case of **Shemsa Khalifa & 2 Others vs Suleiman Hamed Abdallah, Civil Appeal No. 82 of 2012 (CAT, Unreported)**.

Replied to this ground, the respondent submitted that, the arguments of the appellant were not supported by the records as there is nowhere the respondent and his witnesses testified that there was a written agreement regarding the purchase of Plot No. 433 Kitalu "A" Bariadi as the same was done orally. He added that for that reason the cited cases of Shemsa Khalifa, and Semen Mgonela are distinguished as relevant when there are written agreements between the parties.

On the second ground of appeal, the appellant complained that a material witness who witness the alleged purchase was not called to testify who is Ward Executive Officer Mr. Sima. He added that the said witness could have given evidence of his interest. He supported his argument with the case of **Hemed Said vs Mohamed Mbilu** (1984) TLR No. 113.

Responding to this ground, the appellant submitted that the law of evidence allows a party to call a witness he thinks is credible and competent to build his/her case. thus, as Mr. Sima did not witness the purchase alone that's why he was not the only key witness to the respondent's case. The same is evidenced by SM2 (Paulo Michael) and SM3 (Sayi Mgembe) who witnesses the purchase with Mr. Sima. Therefore, this ground has no merit.

On the third ground of appeal, the appellant complained that after exhibit "M" was admitted the same was not read loud for the opposite party to know its contents and to cross-examine on the same. However, the appellant alleged he was not accorded such rights. He referred this court to several cases including the case of **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017 and **Mohamed Issa vs John Machela**, Civil Appeal No. 55 of 2013 (CAT, Unreported).

Responding to this ground, the respondent submitted that the same has already been covered on the 2<sup>nd</sup> ground of appeal that Mr. Sima was not the sole witness, thus, a case was proved on the balance of probabilities.

Responding to the 4<sup>th</sup> ground of appeal regarding the admission of exhibit was not raised at the 1<sup>st</sup> appellate court hence, it cannot be raised at this stage. He added that when the same was tendered the appellant was aside and said he had no objection, therefore the same proved he had a chance to look at the exhibit. And further to that he did cross-examine the respondent on that exhibit, and he replied he did not put his signature on it. So, the said evidence proved he was aware of that exhibit. He supported his arguments with the case of **Tanzania Cotton Marketing Board vs Cogecot Cotton Company S.A** (2004) TLR 132 ad **Makubi Dogani vs Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (Unreported).

In a brief rejoinder, the appellant reiterated what has already been submitted in the submission in chief.

Having heard the rival arguments from the appellant and the respondent, the issue for determination before this court is **whether the appeal is meritorious.**

It is the trite principle that this court cannot interfere with the concurrent findings of the two courts below unless the findings are based on misdirection or misapprehension of evidence. It can only interfere where there is a violation of a principle of law or procedure or when there is a miscarriage of justice.

Starting with the 4<sup>th</sup> grounds of appeal, the respondent complained that the same was not among the grounds raised at the 1<sup>st</sup> appellate court and the appellant in his rejoinder remain silent regarding this allegation. I have revisited the records of the trial court and noted that the 4<sup>th</sup> grounds were among the grounds raised at the 1<sup>st</sup> appellate court as it has raised as a rejoinder to the petition of appeal dated 17<sup>th</sup> February 2021.

Coming to the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> ground of appeal, this court noted that the same grounds were raised at the 1<sup>st</sup> appellate court. More to that, this court noted that the 1<sup>st</sup> appellate court responded to those grounds without any misapprehension of evidence and violation of the law.

Starting with the issue of calling a material witness, the same was correctly answered that SM2 and SM3 also witnessed when the respondent gave money to the appellant herein, thus, as there is more

than one eye witness there is no need for Mr. Sima to be called so that the respondent's case to be proved.

However, it is common knowledge that it is not the number of witnesses that determines prove the case, but their credibility and weight of evidence are matters of the highest consideration this also shown in Section 143 of Cap. 6, the law of evidence Act which direct that the number of witnesses matters less as what is important is the credibility and reliability of a witness in a case. This was elaborated in the case of **Siaba Mswaki v. Republic** CAT-Criminal Appeal No. 401 of 2021 (unreported).

As for the issue of proof on the balance of probabilities, in the case of **Ernest Sebastian Mbele vs Sebastian Sebastian Mbele and 2 Others**, Civil Appeal No. 66 of 2019 (CAT at Iringa) held that:

*"The law places a burden of proof upon a person "who desires a court to give judgment "and such a person who asserts...the existence of facts to prove that those facts exist (Section 110 (1) and (2) of the Evidence Act, Cap.6). Such fact is said to be proved when, in civil matters, its existence is established by a preponderance of probability (see section 3 of the Evidence Act, Cap. 6)."*

Also in case of **MARY AGNESS MPELUMBE VS SHEKHA NASSER HAMAD** Civil Appeal No 136 of 2021

CAT held that *who alleges has the burden of proof as per section 110 of the evidence Act cap 6 R.E 2019.(ii)standard of proof in a civil cases is on a preponderance of probabilities meaning that the court will sustain such evidence that is more credible than the other on a particular fact to be proved.(iii) The burden of proof never shifts never shifts to the adverse party until the party on whom the onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case "*

In our case, as it was well elaborated by the 1<sup>st</sup> appellate court, the respondent at the trial court proved his case on the balance of probabilities, and his evidence was supported with SM2 and SM3. The allegation of the appellant at the trial court that he was forced to sign unknown things does not hold water as the same lacks proof.

As it was held in the case of **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (CAT- Unreported) where the Court stated that: -

*"... The law is well-settled that on a second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong, or unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

Thus, guided by the cited authority, this court is of the firm view that there is no need to disturb the concurrent finding of the two courts below as there is no violation of the principle of law which leads to miscarriage of justice.

As alluded to herein, this court finds no merit in his appeal. The same is hereby dismissed with costs.

Ordered accordingly.

**DATED** at **ARUSHA** this 23<sup>rd</sup> day of June 2023.

**R.B. Massam.**  
**JUDGE**  
**23/6/2023**

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Ordered accordingly.

**DATED** at **SHINYANGA** this 23<sup>rd</sup> day of June 2023.



A handwritten signature in blue ink, appearing to read "R.B. Massam".

**R.B. Massam.**  
**JUDGE**  
**23/6/2023**