

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

PC CIVIL APPEAL No. 62 OF 2022

(Originating from Karatu Primary Court, Civil Case No. 23 of 2022)

RAJABU JOSEPH _____ APPELLANT

VS

JULIANA ARUSHA _____ RESPONDENT

JUDGMENT

26/06/2023 & 03/07/2023

BADE, J.

The Appellant herein after being aggrieved by the decision of the District Court of Karatu in civil appeal No. 14 of 2022, appealed before this court based on the following grounds of appeal.

- i. That, the decision by the first appellate court is bad in law for being arrived without proper reasoning, logic, and adherence to the well-established guidance by the superior courts of the land on the effect of a document improperly admitted in court.



- ii. That, the first appellate court skipped its legal duty of determining appeal before it on merit hence its decision cannot be left to stand.
- iii. That, the first appellate Magistrate was in a hurry to conduct a hearing of Civil Appeal No. 14/2022 and deliver judgment, hence justice buried.
- iv. That, the judgment reached in Civil Appeal No. 14/2022 is vitiated as arguments from both parties were neither scrutinized nor considered in composing judgment.

This appeal emanates from the Primary Court of Karatu in Civil Case No 23 of 2022, in which its decision was appealed against before the District Court of Karatu vide Civil Appeal No 14 of 2022. It is upon records that on the 5th April 2022 the Appellant sued the Respondent for the recovery of TZS 15,000,000 being payment for the purchase of the tractor. Then having received the money, the Respondent handed the said tractor to the Appellant but defaulted to hand in its registration card. The Appellant having successfully sued the Respondent, the Respondent appealed before the District Court of Karatu after being aggrieved by the decision of the trial Primary Court of Karatu which required her to pay a total of TZS 17,700,000 in a period of one month commencing from 13th June 2022. The appeal before the 1st Appellate Court i.e Karatu District Court was disposed in favour

of the Respondent, which has then led to this present appeal before the High Court as a 2nd appellate court.

The Appellant submitted that, it is a well-established and settled principle of law on how exhibits improperly admitted should be treated. Both Courts of record thoroughly have put in place the guiding principle on this. The Court of Appeal in the case of **Eusto K. Ntagalinda vs Tanzania Fish Processors Ltd**, Civil Appeal No. 23 of 2012 (Unreported) while addressing this question held inter alia:

"What are the consequences of all the above noted shortcomings? We are of the settled mind that since those exhibits were not pleaded, the only plausible conclusion is to expunge them from the record as we hereby do" (Emphasis supplied)

He further submitted that, in the case of **Mwijage Jackson vs Elizabeth Reganwa and Others**, Land Case Appeal No. 40 of 2020 where it was observed (unreported):

"Failure to read any admitted documentary Exhibit in the trial tribunal is fatal and vitiates the proceedings of the trial tribunal therefore I expunge exhibits PE1, PE2, PE3, PE4, and D1 and D2 from the record of the trial tribunal. Having expunged the Exhibits of the

Applicant/Appellant and Respondents here are retained with the oral account of witnesses" (Emphasis supplied)

He also submitted that the proper recourse that should have been taken by the learned magistrate was to expunge the exhibits improperly admitted and to determine the appeal on the remaining ground of appeal based on the evidence remaining on record, but unfortunately this was not the case in the impugned decision where the learned magistrate erroneously nullified the trial courts judgment and proceedings because exhibits were improperly admitted.

The Appellant also submitted that, the above enumerated reasons and authorities, it our stance that it is improper in the eyes of the law to nullify proceedings and the judgment of the trial court based on one ground of appeal, ignoring the remaining grounds of appeal without assigning reasons in doing so. In the case of **Firmon Mlowe vs Republic**, Criminal Appeal No. 504 of 2020 (unreported) the Court of Appeal held inter alia:

"We must however emphasize that, even where the first appellate court decides to address the grounds separately or generally or the decisive one only, it must specifically indicate so in the judgment.

Unfortunately, this is not the position in the case at hand. It is noteworthy that, though the grounds in the petition of appeal raised several factual and legal issues which were substantially canvassed by the parties during the hearing of the appeal as intimated above, there is no indication in the record that the substance of the complaints of the appellant on the grounds were fully resolved by the first appellate court. On the contrary, as stated above, the first appellate court dealt with three grounds and concluded the matter without stating anything in respect of the parties' submissions on other grounds of appeal".

He further submitted that, it is his firm opinion that Civil Appeal No. 14 of 2022 before the District Court was mishandled, that is why, despite this Court being the second appellate court still it is invited to consider both matters of law and fact following that impropriety of the conduct of the first appellate court, he cited the case of **Helmina Nyoni vs Yeremia Magoti**, Civil Appeal No. 61 of 2020 (unreported) where it was held that: -

"it is trite law that second appellate court should be reluctant to interfere with concurrent findings of the two courts below except in cases where it is obvious that the findings are based on misdirection or misapprehension of evidence or violation of some principle of law

or procedure or have occasioned a miscarriage of justice” (Emphasis supplied)

It is his further submission that, it is his belief and understanding that even if the documentary exhibits tendered by the appellant in the trial court are expunged still there is a sufficient proof on record to substantiate the appellant's claim. The oral account of events from witnesses demonstrates that. Making reference to pages 2 and 8 of the trial court proceedings, there is admission by the respondent that the parties herein entered into a sale agreement of a tractor but the said tractor was sold without the registration card with an understanding between them that the respondent will supply the said card to the appellant on or before 1st April 2022, unfortunately, that was not done. This confession is buttressed by the appellant's oral testimony.

He also stated that it is trite law that when the contract is of the above-enunciated nature, it becomes voidable, and whoever executed his end of the bargain shall be entitled to either compensation or to be refunded. Therefore, the appellant was at liberty to rescind the said contract which he did, and the civil Case No. 23 of 2022 before Karatu Primary Court was instituted for the appellant to be refunded the contractual sum paid to the respondent. On that take the trial magistrate was justified to issue a

judgment in favor of the appellant by ordering the respondent to refund the appellant herein the sum of Tsh. 17,700,000/=

He also submitted that, on the strength of the above submission and authorities, it is their prayer that this Court be pleased to nullify the proceedings and quash the decision of the District Court in Civil Appeal No. 14 of 2022; and re-instate or appraise the decision of the trial court in Civil Case No. 23 of 2022 with costs.

Responding to the submissions by the Appellant, the Respondent argued with regards to the first ground of appeal, stating that the said exhibits were tendered improperly in the sense that, the Respondent before did not issue the said documentary evidence to the opposing party and the said documents were not attached to the form which was filled by the complainant in the course of opening the case in court, hence that is an unfair trial on the part of the Appellant, and the Respondent conceded to the said irregularity.

He further submitted that, the said exhibits being the agreement for the transfer of the land in dispute, it had to undergo a proper legal process of tendering and admission, the said documents had no stamp duty contrary to

section 47 of the Stamp Duty Act and this fact was not considered by the 1st appellate court. The records show that, the exhibits herein were admitted while during the closure of the defense case, the one whom the exhibit was tendered against under such circumstance could not exercise his right with regards to the said exhibit hence he was denied his right to be heard which is fatal, he referred the case of **Sadiki Athumani vs Republic**, 1986 TLR 235 (HC) which emphasized that failure. There is also confusion as to which documents were administratively (sic) tendered and which ones were judicially tendered.

The Respondent summed up his submissions, by stating that since the said exhibits were the center of the dispute, it is hard for the Appellant to prove his case, even if the Court reevaluates the said evidence it will be insufficient without the said exhibits, it is his view that the issue raised suo motu by the 1st appellate court was proper since it sufficed to dispose the appeal, hence prays for the dismissal of the appeal and the costs thereto.

In rejoinder submissions, the Appellant reiterated his earlier submissions that since the said exhibits were wrongly admitted, the proper recourse was to expunge them instead of nullifying the whole proceedings.

Having considered both Parties' submissions, the court's issue for determination is whether this appeal is maintainable.

With regards to the nature of the 4 grounds of appeal that have been raised, this Court shall consider and deliberate the 1st ground of appeal, which if answered in affirmative, shall automatically render the remaining grounds of appeal nugatory and thus unworthy of detention for determination as they will save nothing.

This ground of appeal puts forth that there was improper tendering of exhibits before the trial court, and the 1st appellate court made an improper approach by nullifying the whole proceedings and judgment of the trial court while they were only to be expunged from the records. It is the view of this court that, it is not always the case that when the exhibits are illegally tendered, they have to be expunged, since the said exhibits were touching the root of the matter, expunging them would be a total disregard of justice basing on technical grounds. The root of this appeal is the sale agreement between the parties hence the said documentary evidence regarding the sale and transfer of ownership is unavoidable in considering the matter at hand. The Appellant faults the filing of the said case before the trial Primary Court, it is my considered view that with regards to the failure to attach the said

exhibits with the plaint before the Primary Court is not fatal and the learned counsel was to be guided by the Primary Court Civil Procedure Rules, certainly not the Civil Procedure Code, Cap 33 [RE 2019]. In the said Rules, there is nowhere that is stated that such attachment is mandatory, hence the cases he has filed in support of this argument are distinguishable since they dealt with circumstances where the plaint has been filed as per the Civil Procedure Code, Cap 33 [RE 2019]. In the case of **Mwita vs Republic**, Criminal Appeal No. 19 of 2012 (unreported) the court held that:

"The law is well-settled that on 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 clearly unreasonable, or are a result of a complete misapprehension of the substance, nature and quality of the evidence, misdirection or non-direction on the evidence, a violation of some principle of law or procedure or have occasioned a miscarriage of justice"

In line with the above position, I subscribe to the Appellant's view that there was a contravention of the law in both tendering and admitting the exhibits before the trial primary court. Page 6 of the typed proceedings of the trial

primary court shows that the procedure for tendering and admitting exhibits was violated, for clarity, I wish to reproduce the phrase in the said 6th page of the trial court's proceedings:

"Mahakama; Imefunga ushahidi na vielezo vimepokelewa"

The trial court's records do not show the whole process as to who tendered the said exhibits, or how were the documents received by the opposing side. There is nowhere on records where it is shown that the exhibits were read aloud in court.

An exhibit refers to a document, record or any other tangible object formally admitted in court as evidence. The procedure regarding admission of exhibits, applicable in civil cases, is generally applicable in criminal cases as well. It is a well-established principle of law that, once the exhibit is admitted, a person tendering the exhibit shall read out its contents in court to enable the opposing party to understand the contents of the document(s) and to afford the opportunity to raise an objection if any. Their objection can be regarding the form, content, structure, or relevancy of the document. The trial court/ tribunal will need to rule on the admissibility of the exhibit and then admit the exhibit into the evidence.



Meanwhile, the exhibits would need to be read aloud in court by the person tendering the said exhibit to bring its relevance into the evidence of the case and proceeding. Failure to allow or direct the witness to read it, was a flaw in the procedure and a serious infraction that infringed parties' right to a fair hearing and therefore vitiated the proceedings. Also, the exhibits tendered were not original, while the Regulation requires the same to be original with exceptions as stated therein. The ones tendered and admitted by the court were not originals. Logically and in consequence, such documents will have to be expunged from the court records. See **Mbaga Julius vs Republic**, Criminal Appeal No. 131 of 2015, (unreported) where the Court of Appeal held that:

"Failure to read out documentary exhibits after their admission renders the said evidence contained in those documents, improperly admitted, and should be expunged from the record"

Meanwhile, as much as I am aware of the fact that the Civil Procedure Code or the Evidence Act would not apply in the Primary Courts, particularly before the inception of the Rules that allow the appearance of the advocates in the said courts.

Still in its simplicity, the court would have to devise a way of taking in the procedure that brings fairness and coherence in the tendering of exhibits in evidence, and the record should testify to such process. In tendering of documentary evidence, Regulation 11 of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations apply, and the same provides that:

"the original document must always be produced, and that where it is so produced, oral evidence must be given to connect it with the case"

The rule about reading out aloud the tendered exhibits I would say, derived its relevancy from Regulation 11(2) where it is required that when documentary evidence has been tendered, oral evidence has to be adduced to bring in the relevance /connection of the thing produced to the case at hand.

So then the question begs what would be the consequence of the procedural flaw as deliberated above? Since exhibits are part of the evidence and the legal procedure on how they should be received in court has been violated, this implies that the Appellant was denied the right to be heard, failure by the court to receive them as required by the law, renders the said exhibits lose their evidential value. For the just determination of this matter, it is the view of this court that the said exhibits i.e the sale agreement and the other

two would have been expunged from the records, but the fact that they go to the root of this matter makes this Court observe that the exhibits are worth of reconsideration rather than expunging them.

In the case of **Ahmedi Ali Dharamsi Sumar vs Republic**, Criminal Appeal No. 75 [1964] E.A, the court held while considering if the retrial should be ordered or not:

"Whether an order for re-trial should be made depends on the particular facts and circumstances of each case but should only be made where the interests of justice require it and where it is not likely to cause an injustice "

This authoritative authority was quoted with approval with this Court by Muruke, J. as she then was while considering circumstances similar to the one presented in this case where admitted evidence was taken in so unprocedurally in the case of **Selemani Selemani Mkwavila (as Administrator of the Estates of the Late Jafari Juma Budu) vs Agatha Athumani & Anor**, Land Appeal No. 5 of 2022, High Court Mtwara (unreported), where she held:

"Depending on the circumstance of this case and for the interests of justice, I hereby quash the proceedings of the trial tribunal and set



aside its judgment reached. I thus order the case file to be remitted to the trial Tribunal for hearing of the same afresh.

In the upshot, this appeal is partly allowed after consideration of the 1st ground of appeal which preempted the discussion of the remaining 3 grounds of appeal. I uphold the decision of the 1st appellate court but for different reasons as discussed above, and in further consequence, I order a retrial where the Primary Court is to retake the evidence afresh and properly admit exhibits.

Order accordingly.

DATED at ARUSHA on the 03rd day of July 2023



A. Z. Bade
Judge
03/07/2023

Judgment delivered in the presence of the Appellant in chambers on the **03rd day of July 2023.**



A. Z. Bade
Judge
03/07/2023