

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

PC CIVIL APPEAL No. 05 OF 2023

*(Arising from District Court of Bukoba Civil Appeal No. 20/2020 Originating from Primary Court Nsunga
Civil Case No. 68/2020)*

**PETER SWAI & 2 OTHERS APPELLANTS
VERSUS**

ERASTO CHELINGO RESPONDENT

JUDGMENT

K. T. R. MTEULE, J.

1st June 2023 & 1st June 2023

The Appellants were the Defendants in **Civil Case No. 68/2020** in the Primary Court of Nsunga in Misenyi District where the instant Respondent Erasto Chelingo sued claiming for **TZS 2,700,000.00** being a sum of money he lent to the Appellants. The Primary Court found the case to have been proved and the ordered the Appellants who were the respondents therein to pay the some claimed to the instant respondent, in a division of 900,000 to be paid by Raimond Miluko (3rd respondent) and 1,700,000 to be paid by the Peter Swai and Gisela Miluko.

The Appellants were not satisfied hence they appealed to the District Court of Bukoba at Bukoba vide **Civil Appeal No. 20/2020** with 5 grounds of

Appeal. The District Court of Bukoba decided in favor of the instant Respondent and confirmed the decision of the Primary Court. The appellants being dissatisfied with the decision of Bukoba District Court, Appealed further to this Court with 4 grounds of Appeal as reproduced hereunder:

1. THAT, the honourable District Court erred in law and facts by deciding the case in favour of the Respondent while the matter before the trial Primary Court was not proved on balance of probabilities;
2. THAT, the learned Resident Magistrate of the District Court highly erred in law and facts for failure to come into conclusion that the trial Primary Court based its finding on weak and shallow evidence of the Respondent;
3. THAT, the first appellate Court grossly erred in law and facts for failure to order and decide that the Primary Court of Nsunga erred in law to order the 1st Appellant and 2nd Appellant to pay the amount of Tshs. 1,700,000/= and the 3rd Appellant to pay the amount of Tshs. 900,000/= without any reasonable justification;

4. THAT, in totality the Hon. Resident Magistrate of the District Court erred in law for failure to come into conclusion that the proceedings before the trial Primary Court was nullity and tainted and with illegalities.

The appeal was heard by oral submissions. The Appellants were represented by Advocates Gisella Maruka and Pilly Hussein while the Respondent was represented by Advocate Lameck Erasto.

Upon hearing, the appellants' counsels abandoned all grounds No. 1 to 3 and remained with one ground which is the 4th ground of appeal concerning points of Law that the Hon Magistrate of the first appellate court erred in failure to find that the proceedings of the primary Court was a nullity for being tainted with irregularities.

In arguing this 4th ground, Advocate Pilly Hussein made the submissions. She stated that the proceedings of Nsunga Primary Court are tainted with irregularities and therefore they are a nullity. She pointed the first irregularity that the assessors changed hands without a proper procedure. She referred to page 4 of the Primary Court proceedings of 11/02/2020, where the quorum contained **Ismail** and **Jonathan** as assessors. That

after the evidence of the plaintiff, the assessors who examined the witness as per page 6 of the typed proceedings were **A. Abib** and **W. Waswa** who were not in the quorum. They wondered how these two assessors got access to examine or question the witness while the quorum recorded names of other assessors.

Ms. Pilly proceeded to submit that on 20/02/2020, the assessors on quorum as per page 10 of the typed proceedings were **S. Ismail** and **Jonathan** and they asked questions but the judgment of the Primary Court was signed by assessors S. Ismail and A. Abib. She submitted that it is a legal requirement that the set of assessors should be maintained and when there are changes, the Court must explain. She referred to the case of **Edwin Kakwesigabo and Another vs. Adventina Gervas Misc. land Appeal No. 33 of 2021 (unreported) before Ngigwana J, from page 7** where at the last paragraph, the Hon. Judge quashed the proceedings of the Ward Tribunal because the set of assessors was not maintained and with no explanation. She asked for the court to take that position and find that what happened in the Primary Court of Nsungu was a nullity and quash the judgments orders and proceedings of the said

Primary Court and set aside the decision of the District Court of Bukoba for originating from invalid proceedings.

She pointed another irregularity that when the complainant was giving evidence, he did not swear or take an oath as it appears at page 4 of the typed proceedings. It is a legal requirement that a witness needs to give his evidence on oath and short of that, renders the evidence with no value and must be disregarded. She referred to the case of **David Joseph Mahende vs. African Group (T) Ltd, Civil Appeal No. 200 of 2016 CAT**, (unreported), and stated that in this case, the Court addressed the importance of taking oath from page 7, 16, 817 that the requirement is mandatory and failure to do so vitiate the proceedings. She added that the testimony was found invalid and expunged from the record. In her view, by expunging the evidence of PW1 in the primary Court, what remains is the defence evidence (by the instant appellants) which is not sufficient to prove the case against the appellants.

Basing on these irregularities, Advocate Pilly prayed for the appeal to be allowed with costs and the decision of the District Court be set aside

and the Judgment orders and proceedings of Nsunga Primary Court be quashed and set aside.

In reply, Advocate Lameck submitted to concede on the issue of changes of the names of assessors in a confusing manner, where the pairs were being irregularly changed in the proceedings of the primary Court. He agreed that these is contrary to law as said by my fellow counsel for the appellants.

He further agreed that the record does not shows if the respondent took an oath. He cited **Rule No. 46 (2) of the Magistrates Courts (Civil Procedure in Primary Court) Rules, 1964** which requires evidence to be given an affirmation.

On costs, Advocate Lameck disputed the prayer on the ground that the errors were committed by a Magistrate and not his client. In his view, condemning his clieny to pay costs won't be fair.

Mr. Lameck was on further view that after nullifying the proceedings, each party should bears its own costs. He further prayed for the court to make

an order that shall the Respondent still be interested, he is allowed to refile another suit to be tried by another Magistrate.

Having heard the submissions of the parties, I see that the counsel for the Respondent is not disputing the existence of the irregularities noted by the appellant's counsels. In that respect, and having considered the laws and authorities cited by the parties, I agree that there were fatal irregularities in the proceedings of the Primary Court where the assessors changed in the court room without any explanation and on the Primary Court failure to take an oath of a witness. The remedy in my view is to have the Primary Court proceedings nullified as suggested by the parties with an order quashing and setting aside the decision of the District Court.

Mr. Lameck is disputing on the costs and made an additional prayer for the Appellant to be given an opportunity to refile the matter after the nullification of the proceedings of the Primary Court if he so wishes.

I agree that the respondent cannot be condemned to pay costs for an irregularity which are not his fault. Mr. Lameck's argument on costs has merits.

As well, since the proceedings of the primary court are going to be nullified, substantive justice has not yet been determined. In this respect, the matter will be open for any party who is interested to file another suit on the same subject matter to do so.

Having said so, this appeal is allowed. The Judgment of the district Court in **Civil Appeal No 5 of 2023** are hereby quashed and set aside for being founded on invalid proceedings. I further nullify the proceedings of the Primary Court in **Civil Case No 68 of 2020** for being tainted with incurable irregularities. Parties are at liberty to institute another suit on the same subject matter shall any of them still be interested. No order as to costs.

It is so ordered.

Dated at Bukoba this 1st June, 2023



KATARINA REVOCATI MTEULE

JUDGE

01/06/2023

Judgment delivered this 01st Day of June 2023 in the presence of the counsels for the Appellants and in the presence of the Respondent, Mr. Lameck John Erasto Advocate.



KATARINA REVOCATI MTEULE

JUDGE

01/06/2023

