

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

PC CIVIL APPEAL NO. 30 OF 2021

*(Originating from Civil Appeal No. 42 of 2021 from District Court and Civil
Case No. 65 of 2021 from Mkula Primary Court)*

GRACE HAMISI..... APPELLANT

VERSUS

MWENYEKITI WA KIKUNDI CHA ELIMISHA.....1ST RESPONDENT

KATIBU WA KIKUNDI CHA ELIMISHA2ND RESPONDENT

JUDGMENT

30th June & 4th August 2023

MASSAM, J.:

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

- 1. That, the appellate magistrate misdirected herself by dismissing the appeal while the appellant managed to prove his claim to the balance of probability.*

2. *That, the appellate court erred in law and facts by failure to consider that the respondents took and sold the appellants properties or items illegally and in lower costs as compared to real values of it.*
3. *That, the appellate court erred in law to declare that there was no need for the respondents to follow the procedure before selling the appellants items while exhibit A requires legal procedure to be followed and not selling.*
4. *That, the appellate magistrate erred in law and facts by failure also to consider that the appellant was ready to pay tshs 307,500 to the respondents.*

Briefly, the facts of the case are that; the appellants filed a case against the respondents at Mkula Primary Court claiming to return back her items which they took from her home on 23/12/2020 which are two sofa sets two televisions, three wooden tables, three carpets, one subwoofer and one plastic chair. All these properties were worth Tshs 4,000.000. Having heard both parties, the trial court was satisfied that the appellant did not prove her claim as required by the law, so her claim was dismissed and the appellant was ordered to pay 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 respondents appeared in persons, unrepresented. Hearing of appeal was by way oral submissions

Submitting in support of the appeal, appellant said that she was aggrieved by the decision of both courts as at the trial court she proved her case that she was owed by the respondent only Tsh 307, 500 and they agreed with respondent that to look for their money in order to return her properties but the respondent decided to sell her items without inform her.

She added by stating that she has a receipt that the said items belong to her. And the Constitution of Elimisha directs that if a person default to pay will be responsible but not to be sold his/her properties. Again, she said that she doesn't know the price of the properties sold.

Opposing to this appeal, 1st respondent submitted that he is not the one who took the said properties not 2nd respondent but "Kikundi cha Elimisha " appellant took a loan and promise to return it but she failed to

return it on time so they decided to go to their house with ten cell leader and find her husband who agreed the said properties to be taken by them.

He added that they stayed with that properties to wait for appellant to pay for her loan but she did not until on 4/1/2021 when they decided to go to VEO office to show to him that properties as appellant promised to pay the money on 6/1/2021 but she didn't until on 21/4/2021 when they decided to sell it, after tried to call her but she refused to appear to their office. Later on she went to court and file the case that her properties were stolen while she gave the same to them in the presence of her husband. 2nd respondent in his reply he stated their kikundi was registered on 25/1/2019 and the one who took that properties was the said kikundi as appellant failed to pay the amount which she was claiming from them. He added by saying that appellant and her husband were the one who handed the said properties to them so they did not steal them.

In her rejoinder appellant stated that their constitution does not allow the properties to be sold and on 21/4/2021 she got money and call Veo to inform kikundi to go and take their money but she was told that the said items were already sold..So her interest is to know how much does her properties were sold.

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 1st ground of appeal, the appellant complained that appellate magistrate misdirected herself by dismissing the appeal while the appellant managed to prove his claim to the balance of probabilities. In perusal of the trial court evidence this court has no doubt that the respondent do not dispute on existence of the said items and there no doubt that appellant had a debt of Tsh 307,500/= as appellant did agree herself to have that debt and she failed to pay it on time. The court record show that when the said items were seized appellant and her husband was there and were the one who allow them(respondents) to seize the said items, and there was no doubt that appellant did agreed to pay the said money on 4/1/2021 this is supported by the exhibit A in that exhibit they agreed that the items will be returned as soon as appellant pays the money

on 6/1/2021 but appellant failed to honor the said agreement of paying the same until on 21/4/2021 when the respondent sell the items its when appellant came and show the interest of returning back the money, this court finds out from the date of agreement until the date where the items were sold was almost four months this make this court to believe that appellant had no intention to return back her items because if she had that intention she could find any means to get money to pay back. So the act of appellant came back after the sold of that properties was after thought. Their agreement was for the appellant to pay back the money in order to be returned her items but appellant failed to do so.

Appellant in her submission complained that the respondent did not inform her when the said items are sold and the price. This court perused in the court record which show that the said items was sold with the price of Tsh 500,000/=and the appellant was there and was the one who incurred the costs in the said sale. This court has in view that appellant was supposed to bring the evidence to prove that the sale of her items was illegal and respondents did not inform her when her items were sold and the price sold as the burden of proof was upon her as it was elaborated 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 the case of **Mary Agness Mpelumbe vs Shekha Nasser Hamad** in 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 civil case 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 to the adverse party until the party on whom the onus lies discharges his burden and that burden of proof is not diluted on account of the weakness of the opposite the party's case.*

In our present case this court finds out that the respondent proved their case on the balance of probabilities as the respondents side succeeded to proof that appellant had a debt and she mortgaged her house, and appellant failed to pay back the said debt and consented

together with her husband to hand over some items for the promise to take them back after paying back her debt of Tsh 307,500/= unfortunately she failed to pay back until when her items sold its when she came back to pay her debt. So there was no doubt appellant was ready to pay her debt but the issue was time as record shows that as per exhibit A which dated on 4/1/2021 appellant promised to pay that debt on 6/1/2021 but she did not honor that agreement until on 21/4/2021 its when she show up that she is ready to pay that was not their agreement, So according to that 1st and 4th ground of appeal has no merit.

The allegation of the appellant at the trial court that the respondent took her items in her absence does not hold water as the same lacks proof as there was evidence from respondent which counter the same that on seizing of the said items there were street chairman and appellants husband who agreed the same to be taken for the promise of paying back the debt and returned her properties. So 2nd ground of appeal has no merit.

And the law is well settled that on second appeal the court will not readily disturb concurrent finds 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 ,violation of some principle of law or procedure or have occasioned a miscarriage of justice, this was well elaborated in the case of **Wankuru Mwita V Republic Criminal Appeal No. 219 of 2012(CAT Unreported)**.

Thus guided by the cited authority this court is of the firm view that that there is no need to disturb the concurrent findings of the two courts below as there is no violation of the principle of law which leads to miscarriage of justice. That said and done I feel not obliged to test the rest of the grounds of appeal since the 1st ground which was the major ground and suffices in disposing of the entire appeal. For the stated reasons above this court finds no merit in his appeal .The same is hereby dismissed with costs.

It is so ordered.

DATED at SHINYANGA this 4th day of August 2023




R.B.Massam.
JUDGE
4/8/2023