

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB-REGISTRY
AT ARUSHA**

CIVIL APPEAL NO. 13 OF 2022

(C/f Resident Magistrates Court of Manyara at Babati, Civil Case No. 8 of 2020)

MON'GI NANGAN LAIZER APPELLANT

VERSUS

ROBERTY MELINYO MOLLEL RESPONDENT

JUDGMENT

06th June & 05th September, 2023

KAMUZORA, J.

The Respondent herein Roberthy Melinyo Mollel instituted a civil suit before the Resident Magistrates Court of Manyara against the Appellant herein claiming for TZS 59,850,000 as value of the cattle and sheep he had entrusted to the Appellant. Briefly, the Respondent herein alleged before the trial court that on 28th September 2016 he entered into an oral agreement with the Appellant for the Appellant to graze and breed Respondent's cattle and sheep. The Respondent therefore entrusted 17 cattle and 18 sheep to the Appellant with the agreement that the Appellant will graze and take care of cattle and sheep while in return the

Respondent will assist in tilling the Appellant's 50 acres of farm and payment of school fees for the Appellant's son.

The Appellant took the Respondent's cattle and sheep as agreed but never returned them to its owner, the Respondent. When the Respondent tried to reclaim the same, the Appellant denied having received anything from the Respondent. That triggered the institution of a civil suit before the Resident Magistrate Court of Manyara at Babati, Civil Case No. 08/2020(the trial court). The decision of the trial court was delivered on the 30th day of March 2022 in favour of the Respondent herein (the plaintiff before the trial court) and he was awarded TZS. 59,850,000/= plus costs of the suit. Dissatisfied by the trial court's decision, the Appellant preferred the current appeal on the following grounds: -

- 1) That, the trial court grossly erred in failing to hold that, the claims set out in paragraph 3 and 4 of the plaint were not proved at all.*
- 2) That, the trial court grossly erred in law by not considering that the Respondents claim against the Appellant was barred by the Law of limitation Act to enforce oral contract*
- 3) That, the trial court erred in not conducting mediation i.e having marked the mediation to have failed hence the trial court erred in*

not referring the parties to arbitration or conciliation or mediation and or negotiation.

4) That, the trial proceedings are tainted with gross incurable procedural irregularities which renders the whole decision therefore null and void.

As a matter of legal representation, the Appellant was ably represented by Mr. John Shirima while the Respondent enjoyed the service of Mr. F.S. Kinabo, all learned advocates. Hearing of the appeal was by way of written submissions and both parties complied to the submission schedule.

The counsel for the Appellant abandoned the 3rd ground of appeal and submitted for the remaining grounds of appeal. Arguing in support of the 1st ground of appeal, the counsel for the Appellant submitted that the trial court erred in awarding the Respondent while he failed to prove the claim. That, parties are bound by their own pleadings and pointing at paragraph 3 and 4 of the Respondent's plaint, the Respondent argued that, the gender of the cattle or sheep was not disclosed before the trial court. That, the Respondent was unable to prove cattle multiplied to 38 and how sheep multiply to 95. The Appellant invited this court to consider the case of **Stanbic Bank Tanzania Ltd Vs. Abercrombie**

and Kent (T) Ltd, Civil Appeal No 21 of 2001, in ruling that parties are bound by their pleadings.

The counsel added that the trial court failed to evaluate the evidence from record and ended with unjustified decision. He referred the case of **Stanslaus Rugaba Kasusura and another Vs. Phares Kabuye** [1982] TLR 338.

In respect of the 2nd ground, the Appellant submitted that as per paragraph 3 and 4 of the plaint and Respondent's evidence, parties entered into oral agreement on 28th September 2016. That, the circumstance of the contract falls under customary law which the same is governed by item 5(b) to the 2nd Column of the schedule of the Magistrates Courts (Limitation of Proceedings under Customary Law) Rules G. N No 311 of 1964. He was of the view that the suit was time barred as the law requires the suit to be instituted within three years. The counsel insisted that the trial court had no jurisdiction to entertain the matter which was time barred.

Referring the case of **Maria Ally Ponda Vs. Kherry Kissinger Hassan** (1983) TLR 223 at page 226, he added that the trial court had no jurisdiction to entertain the matter which falls under customary law

whose jurisdiction is vested to the primary court and the high court depending on the value of the subject matter.

Submitting on the 4th ground, the counsel for the Appellant argued that the predecessor trial magistrate Hon. J.M. Mwambago took over the matter from Hon. Jumaa without assigning reasons for the same contrary to Order XVII Rule 10(1) of the CPC Cap 33 R.E 2019. He insisted that the proceeding, judgment and decree were nullity and reference was made to the case of **Mariam Samburo (legal Representative of the late Ramadhani Abasi) Vs. Masoud Mohamed Joshi and two others**, Civil Appeal No 109 of 2016 and **National Microfinance Bank Vs. Augustino Wesaja Gidimara t/a Building Paints General Enterprises**, Civil Appeal No. 74 of 2016. The Appellant prays that the appeal be allowed by setting aside the trial court's judgment and decree.

Responding to the appeal, the counsel for the Respondent submitted for the 1st ground that the gender of cattle was proved by PW5, the Veterinary officer who is an expert. He was of the view that since there was nothing in evidence inconsistent with the expert opinion, the trial court was justified under section 47 of the Evidence Act to rely on the evidence of expert.

Responding to the 2nd ground that the suit was time barred, the Respondent submitted that there is nothing that indicating that the parties entered in to a customary contract. That, the applicable law in this matter is the Law of Limitation Act Cap 89 R.E 2019, Part 1 of the schedule which provides 6years for suits founded on contract not otherwise specifically provided.

On the 4th ground, the Respondent argued and submitted that, the trial was commenced and concluded by a single magistrate namely Jumaa M. Mwambago. That, the case was initially mentioned before a magistrate who did not preside over the hearing hence there was no any evidence or memorandum left by the predecessor. The counsel for the Respondent finalised by stating that the facts of the decision cited by the counsel for the Appellant in support of this ground is distinguishable. The Respondent thus prayed that the appeal be dismissed with costs.

In a brief rejoinder the counsel for the Appellant reiterated his submission in chief and added that, there was no evidence of the gender of the cattle, a fact important to enable the trial magistrate to assess if the same were able to reproduce and multiply as per veterinarian report. He added that the Respondent failed to name the child of the Appellant whom he was supporting, the name of the school he attended which the

Appellant consider as important element to prove the case. The Appellant insisted on the prayer to allow the appeal with costs.

From the above submissions and record of the trial court, the major issue that call for the determination is whether the appeal has merit. This court will therefore assess the reasoning in the grounds of appeal, the records, relevant laws and guiding authorities. Before I discuss the first ground which focuses on analysis of evidence, I will first deliberate the 2nd and 4th grounds which are based on jurisdiction and procedural irregularities.

Starting with the 2nd ground that the suit was time barred, the facts of the case reveals that there existed an oral contract as between the parties, I refer paragraph 3 of the plaint. No were indicating that the parties entered customary contract or intended to be bound by customary law in entering into agreement. Thus, the applicability of customary law to this matter was misplaced. As it was rightly submitted by the counsel for the Respondent the applicable law when it comes to time limitation in instituting civil suit is the Law of Limitation Act Cap 89 R.E 2019. Under part I item 7 of the Act, the time frame for suits founded on contract not otherwise provided for is six years.

The record under paragraph 6 of the plaint, the Respondent contended that sometimes in July 2020 he approached the Appellant and demanded the return of its cattle and he denied. With those facts, the cause of action arose when the Appellant refused to return the cattle to the Respondent. Since the suit was instituted before the trial court on 18th December 2020 then the suit was well within the prescribed time frame and the trial court had all the requisite jurisdiction to entertain it as it did. The 2nd ground of appeal therefore fails.

On the 4th ground basing on the procedural irregularities in the trial courts proceedings, I do not agree with the Appellant's claim that there was change of magistrate without adducing reasons for the same. The counsel for the Appellant did not point out the proceedings that were presided over by a different magistrate. Fortunately, upon thorough perusal of the trial court proceedings, I discovered that when the matter was first filed in court, it was assigned to Hon. J. Mwambago RM. The same was heard and conclude by the same J.M. Mwambago RM. The counsel for the Appellant did not point the part of the proceedings reading the name Jumaa. Even if that was the fact, the initial J in the name J.M. Mwambago connoted Juma. That being the case, the claim

that there existed the change of magistrates without adducing reasons is wanting in merit.

Reverting to the first ground that the trial court erred in awarding the Respondent while the claim was not proved, this court reassessed the evidence and reasoning by the trial court. The trial magistrate was convinced that the case was proved to the required standard by the Respondent basing on the Respondent evidence and other witnesses including report from PW5, Veterinarian Officer (exhibit X).

Despite the fact that there was no written agreement as between the parties, the trial court was convinced that the parties entered into oral agreement. Oral evidence of the Respondent and his witnesses is convincing that they agreed for the Appellant to take care of Appellant's cattle and sheep in the year 2016 as opposed to general denial by the Appellant in which no explanation was made as to why the Respondent pointed him as person whom he handled the cattle and sheep. Since civil suit is proved on balance of probabilities, I agree with the trial court that the Respondent was able to prove that he handled 17 cattle and 18 sheep to the Appellant. The Respondent therefore discharged the burden under sections 110 and 111 of the Evidence Act Cap 6 R.E 2019 by proving facts in his favour. See also the decision of the Court of

Appeal of Tanzania in the case of **Jasson Samson Rweikiza Vs. Novatus Rwechungura Nkwama**, (Civil Appeal No. 305 of 2020)

[2021] TZCA 699 (29 November 2021) which held that,

"It is a cherished principle of law that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Evidence Act."

However, the question that arise is how many cattle could be refunded to the Respondent after the period of almost four years. In his report, the veterinarian office assessed the expected breeding rate of 17 indigenous zebu cattle and 18 sheep. To him, from September 28th 2016 when the same were entrusted to the Appellant to August 2020 when the Respondent claimed them back, 17 cattle would have multiplied to 38 cattle and 18 sheep would have multiply to 95 sheep

It is undisputed fact that the gender of 17 heads of cattle and 18 sheep were not disclosed. There is no doubt that cattle and sheep are reproductive in nature thus, it cannot be said that they stayed with the Appellant from 2016 to 2020 without reproducing. The report by veterinarian officer was based on assumption that all cattle and sheep were physiological and reproductive normal and were reproductive mature at the beginning production period, with no consideration of

multiple lambing for sheep. There is no evidence from the Respondent as to how many among the cattle were bulls or calves or how many were male sheep or lambs as among the sheep at the time of handling the same to the Appellant. Thus, valuation based on assumption that all cattle and sheep were reproductive in nature and were reproductive mature at that time is weak.

Although I agree that the Appellant was handled with 17 cattle and 18 sheep, I do not agree with the assumption that they were all reproductive in nature as others could be bulls and male sheep which are not reproductive in nature and others could be calves and lambs which could not have similar reproductive cycle with those which were reproductive mature at the time of handling. Since no exact number of reproductive matured cattle and sheep was given by the Respondent, this court take a different assumption by considering that half number for each category meaning; 9 cattle and 9 sheep were reproductive mature.

Taking the veterinarian principle of reproductive cycle, by three reproductive cycle which the Appellant had stayed with the cattle, only 11 calves would have survived thus making total of 28 cattle and not 38 valued. Similarly, for the sheep only 33 lambs would have survived at

the end of three reproductive cycle making a total of 51 sheep and not 95 valued by the veterinarian officer.

In the upshot, the appeal is partly allowed to the extent of setting aside the award of TZS. 59,850,000/= and replacing it with the award of 28 cattle and 51 sheep.

DATED at **ARUSHA** this, 05th day of September, 2023




D.C. KAMUZORA

JUDGE