

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

PC CIVIL APPEAL NO. 10 OF 2023

(Arising Out of Civil Appeal No. 36 of 2022 from the District Court of Arumeru, Originating from Civil Case No. 104 of 2022 from Maji ya Chai Primary Court)

EVODIA NAFTAL MOLLEL _____ APPELLANT

VERSUS

IRENE SHABAN _____ RESPONDENT

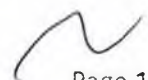
JUDGMENT

24/08/2023 & 10/11/2023

BADE, J.

The Appellant above named, being aggrieved by the Judgment of Arumeru District Court dated on 28/02/2023 and delivered by Hon. I. T. Nguvava, Senior Resident Magistrate appeals to this Court against the aforementioned decision on the following grounds:

- i. That, both trial court and first appellate court erred in law and in fact when they wrongly re-opened the case for discussion while the trial magistrate was no longer seized with power to entertain the matter without affording the appellant a fair hearing.



- ii. That, the first appellate court erred in law and fact by failure to re-evaluate evidence tendered and decided the appeal in favor of the respondent on the sole basis of hearsay evidence.
- iii. That, the first appellate court erred in law and fact by concurring with decision of the trial magistrate on the testimony of SU1 which was full of allegations, contradictions and unsatisfactory in term of quality and credibility.
- iv. That, first appellate court erred in law and facts by relying on the decision of the trial magistrate who admitted exhibit P1 and P2 without stamp duty as required by law and such irregularity has occasioned failure of justice to the appellant thereby vitiating the proceedings.
- v. That, the first appellate court erred in law and facts by not considering the appellant's written submission.
- vi. That, trial magistrate erred in law for departing from the rules of procedure applicable in primary court.

The factual account of this appeal lies on the fact that the appellant sued the respondent before Maji ya Chai Primary Court, claimed that

the respondent owes her a total of TZS 14,500,000 being arrears of the used clothes she sold to her by way of loan. Appellant testified before trial court that she used to give respondent a second-hand clothes bales on the agreement that respondent will pay the money after the sell of the said clothes. That they put their agreement on the sell book. Appellant further testified that she gave respondents several bales of second-hand clothes for about ten months. On those months the respondents failed to abide with the agreement, instead of paying the full amount as agreed after finishing to sell a bale, she was paying only a portion on each bale and at the period of those ten months they did calculations and found out that there were arrears of TZS 14,500,000 but respondent refused to pay.

On the other side, the respondent claimed that she never entered any agreement with appellant. That she knew the appellant as her fellow businesswoman. She further testified that she used to take bales of second-hand clothes by cash to various businesswomen including the appellant.

After a full hearing, the trial magistrate held that there was no valid agreement between the appellant and the respondent because the

said agreement (exhibit P1) was not signed by the respondent and the appellant failed to prove her claim on balance of probabilities.

The appellant was aggrieved by this decision and decided to appeal to the Arumeru District Court [the "first appellate court"] challenging:

- (i) For wrongly re-opening the case for discussion because it was no longer seized with power to entertain the matter which has been closed by the parties without affording the appellant an opportunity to rebut the facts raised suo motu by the magistrate.
- (ii) For failing to evaluate the evidence tendered and decide a case in the sole basis of exhibit P1 while ignoring exhibit P2 which gives details of the transactions of the parties in the business book tendered for proof by the appellant.
- (iii) For considering the testimonies of SU1 which was full of allegations, contradictions and unsatisfactory in terms of quality and credibility.
- (iv) For being biased by deliberately ignoring the request by the appellant on point of objection raised by advocate for respondent on exhibits P1 and P2 having not been stamped

with stamp duty as required by law but curable under the Stamp Duty Act, [CAP 189 R.E 2019]. Such irregularity has occasioned failure of justice to appellant thereby vitiating the proceedings; and

- (v) For departing from the rules of procedure applicable in Primary Court.

The first appellate court after analyzing the submissions of both sides ruled out that the trial court was correct in expunging exhibit P2 from the record as the said exhibit failed to adhere to the law which requires the contract to be stamped. So, the appellate magistrate dismissed the appeal for want of merit.

Again, the appellant was not satisfied with the decision, hence she lodged the appeal at hand.

This appeal was disposed of by way of written submissions. The appellant was represented by Mr. Emmanuel Ole Kokan, learned counsel while the respondent enjoyed the service of Mr. Richard Manyota, learned counsel.

Counsel for the appellant dropped grounds no. 1 and 6 and submitted on 2nd ground, 3rd ground, 4th ground, and 5th ground. In submitting for

the 2nd ground of appeal, Mr. Kokan argues that it was an allegation by the respondent that the agreement documents tendered were forged and were made by the appellant and her husband. That the trial court considered those allegations without proof and the first appellate court upheld the decision. The counsel further argues that the first appellate court ought to have critically analyzed the evidence of the trial court based on the oral account of the respondent's allegations of forgery or any fraud and make its findings, especially on serious criminal allegations that need cogent evidence by the respondent on the standard required by the law, while the allegation is mere hearsay since the respondent could not adduce any evidence to prove her allegation of forgery against the appellant. To support his argument, he cited the case of **Twazihiriwa Abraham Mgema vs James Christian Basil (as Administrator of the Estate of the late Christian Basil Kiria, Civil Appeal No. 229 of 2018** where the court held:

"Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a mere balance of probabilities is required fraud in civil proceedings ought to

be specifically pleaded and proved on a higher degree of probability than that which is required in ordinary civil cases”.

Mr. Kokan also cited the case of **Omary Yusuph vs Rahma Ahmed Abdulkadir** [1987] TLR 169 to support his stance.

Moreover, Mr. Kokan submitted that the respondent failed to lodge her submission as ordered by the first appellate court without assigning any cogent reason and this is disrespecting the court order and amounts to failure to prosecute her appeal. To support his stance, he cited the case of **Godfrey Kimbe vs Peter Ngonyani**, Civil Appeal No. 41 of 2014, citing the case of **National Insurance Corporation of (T) Ltd & Another vs Shengena Limited**, Civil Application No. 20 of 2007 holding failure to lodge written submission after being so ordered by the court is tantamount to failure to prosecute or defend one's case.

Concerning the 3rd ground, Mr. Kokan submitted that the respondent (SU1) did not tender any evidence apart from hearsay allegations that the documents were forged by the appellant with her husband which rendered her testimony contradictory and unsatisfying.

On the 4th ground of appeal, counsel for the appellant submitted that the respondent objected to the admission of exhibits P1 and P2 without

stamp duty which led the appellant to request the trial court to afford the appellant extra time to get the stamp duty from the authority which was granted, pointing to the general requirement of the law under section 47 of the Stamp Duty Act, that instruments of contract should bear stamp duty before its admission for evidence. Mr. Kokan added that it was the Revenue Authority that delayed the return of the document after it was submitted for stamp duty up to almost the date of judgment. Mr. Kokan contends that he could not hold the trial magistrate from proceeding while its order was being implemented by one of the parties and that the delay in submitting the stamped document was out of the appellant's control.

Concerning the 5th grounds of appeal, the counsel maintained that the appellant made her written submission on 22/12/2022 as ordered by the court, but the trial magistrate ignored the same as the judgment did not consider the authorities cited amounting to ignoring the respondent's arguments on the appeal.

Opposing the appeal, the counsel argued the 2nd ground of appeal that both courts below properly evaluated evidence on record and came with proper findings that the appellant's suit is without merit. The assertion by the appellant that they had a contract with the respondent was

defeated by the same contract tendered and admitted as exhibit P1. Mr. Manyota contended that the appellant forged a document purporting to be a contract between her good self and the respondent (exhibit P1) but as fortune will have it, it oddly showed that parties to that contract are strangers and not the respondent.

In his view, he thinks it strange for the respondent to pay for something that she did not own, and chimes in that a clear answer can be found when the appellant was cross-examined by the counsel for the respondent during the trial where she clearly stated that, since Exhibit P1 was not signed by the respondent but rather by her husband, it is not correct to claim anything against the respondent, adding that since the appellant submitted that the allegation of forgery was not amongst the issues raised and determined by the trial court or the first appellate court, there was no need to prove the said assertion, which was essentially raised by the appellant herself. The counsel added that the case of **Twazihirwa Abraham Mgema** (supra) and **Ratila Gordhanbhai Patel** (supra) cited by the appellant's counsel are irrelevant and distinguishable to this case because the forgery was not amongst the key issues for determination at the trial court and hence cannot be questioned upon at this stage.

On the allegation that the respondent lodged her submission in disregard of the order of the court, Mr. Manyota argues that he has no clue where this assertion is coming from. That it was not raised at the 1st appellate court, it was not among the grounds of appeal before this court so it really is an afterthought. Counsel contends that it has been principally established that "appeal has no wonders" it only deals with points aggrieved by the decision of the lower court and not otherwise, and that it is a waste of time to dwell on this fact for it lost its way here.

Countering the 3rd ground of appeal, Mr. Manyota submitted that the evidence by the respondent at the trial court was much heavier than that of the appellant as a result the suit was dismissed for being non-meritorious. That it is not a lie that exhibit P1 was created by the appellant and her husband (SM2) which is why, he argues, their signatures and names appeared on the said document.

On the 4th ground of appeal, Mr. Manyota contended that the appellant prayed before the trial court for the documents to be stamped and she was allowed, it is just unfortunate that she could not do so until the matter at the trial court was scheduled for judgment. Counsel finds it strange that the appellant's advocate claims that his client was curtailed the right to effect stamp duty to the said document. In his further view,

even if the said contract entered between the appellant and her husband would have been stamped as claimed, no injustice was caused to either party, insisting that the said contract is between the appellant and her husband.

Regarding the 5th ground, he submitted that evidence of all parties was well evaluated by the trial court and re-evaluated by the first appellate court with both courts deciding in favor of the respondent, with due consideration to the submission of the appellant before the 1st appellate court save that it did not hold water and thence the decision of the trial court was upheld.

He further argued that the second appellate court should be reluctant to interfere with a finding of fact by the trial court more so where a first appellate court has concurred with such a finding of fact as was the holding in the case of **Sixbert Bayi Sanka vs Rose Nehemia Samzugui**, Civil Appeal No. 68 of 2022 (unreported).

Rejoining, counsel for the appellant reiterated his submission in chief adding that, he takes note that the respondent admitted to having advanced allegations of fraud against the appellant without any proof as well as to have not filed their submission as ordered by the first

appellate court which would mean they had failed to prosecute their appeal in the first appellate court.

He argues that rules of evidence are that parties are bound by their agreement as provided for under Regulation 14 (1) of the Magistrates' Courts (Rules of evidence in Primary Court) Regulations GN No. 22 of 1964, insisting that exhibit P1 which the respondent claimed was a written contract and therefore a contract written by the parties and in language of the regulation governing evidence in primary courts, the trial court was limited to entertain oral account and allegations of fraud which does not fall within the 4 exceptions under those Regulations without following proper procedure.

He asserts further that the respondent admitted on the 4th ground that the trial court was wrong to not give the appellant reasonable time to have the documents stamped with stamp duty as is the requirement of law that the instrument of contract shall bear a stamp duty.

After perusing the court's record and reading the submission by parties, the issue for determination is whether the appeal is meritorious. I will determine the grounds of appeal as raised by the appellant. And to start with, I will determine grounds 1 and 4 together.

It was argued by the appellant's counsel that the trial court and first appellate court considered the allegation of forgery by the respondent without proof. Going through the judgment of the trial court and first appellate court, I find nowhere that shows that trial magistrates considered the allegation of forgery without proof as alleged by the counsel for the respondent. The trial court gave its reason for not taking into consideration exhibits P1 and P2. The trial court also stated that exhibit P1 was not signed by the respondent, it only bears the signature of the appellant and her husband (SM2), so it cannot be termed as a contract between the appellant and respondent.

Looking at Exhibit P1, I have no doubt this observation is true as Exhibit P1 does not have the signature of the respondent to show indeed she was part of what is called a contract between the parties. The trial magistrate accorded no weight to exhibit P2 on the reason that it does not have a stamp duty. The trial magistrate misdirected himself by ignoring exhibit P2 on the ground that it was brought on the date of judgment while the record shows on page 13 of the typed proceedings, that the trial court acknowledged that the advocate for the appellant prayed to tender the duty stamped document on the date of judgment, but as fate would have it, the judgment was not yet composed being

adjourned to 02/11/2022 when it was delivered to the parties, bearing in mind the trial court had already admitted the said exhibit. In essence, it can be concluded that the appellant was accorded the opportunity to pay the stamp duty on the said exhibit and the court admitted it.

It is also my finding that the first appellate magistrate misdirected himself when he ruled out that the trial court was correct in expunging exhibit P2 from the record on the basis of there being no procedure in existence that allows a party to come to court with a document wanting a stamp duty, and make a prayer to be afforded time to go and pay the stamp duty. It is in fact quite a settled law that if a party wants to tender an unstamped document and there is an objection, the court has to allow such party to execute the payment of the stamp duty. In the case of **Sunderji Nanji Limited vs Mohamedali Kassam Bhaloo** [1958] 1 EA 762, which was cited with approval in the case of **Zakaria Barie Bura vs Theresia Maria John Mubiru** [1995] TLR 21, it was held that:

"As was held in Bagahat Ram vs Rattan Chand (2) (1930), A.I.R. Lah 854, before holding a document inadmissible in evidence on the sole ground of it not being properly stamped, the

court ought to give an opportunity to the party producing it to pay the stamp duty and penalty.....”.

I now turn to exhibit P2 which is the major proof that the appellant had on the claim against the respondent. Going through the said exhibit I found it strenuous to comprehend the calculation which it purports to proclaim in there. It shows the number of bales of second-hand clothes and the date they were issued, but it is unclear what was paid and what was not paid for them. There are figures which are bolded in green but it is not clear if those figures are the amount not paid as some of them are signed by the thumbprint of who purported to be the respondent, some are not signed at all, and other figures from 11/12/2021 to 29/12/2021 are not bolded. So one wonders what these figures are supposed to mean. Worse still, out of curiosity and a sense of justice to the parties, when the calculations are done from page no. 1 to page no. 5 of exhibit P2, the sum certainly exceeds the amount of TZS 14,500,000 claimed by the appellant.

Bearing in mind that the appellant in her oral testimony did not testify exactly how many bales of second-hand clothes she loaned to the respondent, or the price of each bale of the second-hand clothing; as well as the amount paid by the respondent. I found it impracticable to

use exhibit P2 to make a finding of fact as exhibit P2 is not self-explanatory enough to support the appellant's claim.

Regarding the allegation that the respondent failed to lodge submission as ordered by the first appellate court; it is rightly argued by the counsel for the respondent an argument that I am inclined to agree to, the appellant did not raise this issue at the first appellate court, so obviously this court cannot entertain it at this stage. The counsel should know better than to throw a dime in the wild and expect the court will simply catch it.

On the 3rd ground, counsel for the appellant alleges that the respondent did not tender any evidence, I think in a bid to shift the burden of proof onto the respondent's side instead of the appellant's. It is a settled law that he who wants the court to give a verdict in his favor on a certain right or liability depending on the existence of certain facts must prove that the same do exist. So the burden of proof lies on the person who alleges. This principle of the law is sourced from section 110 (1 and 2) of the Evidence Act, [Cap. 6 R.E 2019] which provides:

(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Needless to add the extent of proof is based on a balance of probability, and this burden never shifts to the respondent at any one time unless so stated by a specific statute; it is thus lame to expect the respondent to have brought in evidence while the burden to prove the existence of facts forming the basis of the appellant's claim is on herself. The Court of Appeal in **Berelia Karangirangi vs Asteria Nyalwambwa**, Civil Appeal No. 237 of 2017 (unreported) has held:

"... we think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove. that in civil proceedings, the party with legal burden also bears the evidential burden, and the standard in each case is on the balance of probabilities"

Concerning the 5th ground of appeal, the counsel for the respondent argues that the first appellate court did not consider the written submission by the appellant. I find this argument to be lame too as going through the first appellate court's judgment, I see that the trial magistrate did consider the appellant's submission. For instance, when

the first appellate court was discussing the first ground before it, for ease of reference, I reproduce it as saying:

"The appellant advocate stated that the trial court re-opened the case for discussion but nowhere in the trial court record shows the case was re-opened for discussion....."

So, the allegations that the first appellate court did not consider the appellant's submission is wanting in merit. It is just that the arguments presented by the appellant were lacking in force or effectiveness to convince the first appellate court.

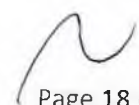
Having said so this appeal is dismissed for want of merits. The Respondent should have her costs.

It is so ordered.

DATED at ARUSHA this 10th day of November, 2023



A. Z. BADE
JUDGE
10/11/2023



Judgment delivered in the presence of the Parties and or their representatives in chambers on the **10th** day of **November, 2023**



A handwritten signature in black ink, appearing to read "A. Z. Bade", written above a horizontal line.

A. Z. BADE
JUDGE
10/11/2023

A handwritten signature in black ink, appearing to be a stylized "N" or similar mark.